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Supreme Court, U.S.
FILED

No. 091556 JUN 16 2010

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

MARK JACKSON ET AL, PETITIONERS

v.

ROHM & HAAS COMPANY ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was directed to consolidate two fraud and racketeering cases which had survived dismissal. Petitioner also filed a motion for preliminary injunction challenging respondents' two corporate mergers because the cases had not been properly disclosed in SEC and other regulatory filings, including proxy solicitation materials. Shortly thereafter, relying on the court's inherent authority, the magistrate judge determined that the consolidated amended complaint constituted so severe a pleadings violation that the drastic sanction of dismissal was recommended. The district court adopted (in substantial part) the magistrate judge's report and recommendation and dismissed 21 of 25 claims. However, petitioner did not receive notice or the opportunity to respond to the threat of dismissal, and there was no de novo review. In confirming the decision, the Third Circuit determined that for purposes of a punitive dismissal of claims, a party's attendance at a non-evidentiary hearing unrelated to dismissal is sufficient to place the party on notice and to confer personal responsibility. The court also dismissed petitioner's motion for injunctive relief as moot since the claims had been dismissed and the transactions had already closed. The questions presented are:

1. Whether a court, relying upon its inherent authority to punitively dismiss claims based upon a pleadings violation, must first provide a party with explicit notice and an opportunity to respond to the threat of dismissal.

2. Pursuant to Rule 72(b), where a party timely objects to a magistrate judge's report and recommendation, whether the district court must review the actual record based upon the party's objections and

issue its own findings.

3. Where the district court determines that a particular pleading contains sanctionable elements, whether a sanction of more than $80,000 is contrary to Rule 11's purpose to deter baseless filings.

4. Pursuant to 18 U.S.C. § 1964(a), where the claim has been brought by a private party, whether the district court has the authority to award the full range of equitable remedies, including: a) setting aside a merger where the shareholder vote authorizing the transaction is based upon a false or misleading proxy solicitation or proxy materials; and/or b) disgorgement of ill-gotten gains.

PARTIES TO THE PROCEEDING

MARK JACKSON; RICHARD J. SILVERBERG, Petitioners

ROHM & HAAS COMPANY; MORGAN LEWIS & BOCKIUS LLP; CONRAD O'BRIEN GELLMAN & ROHN, P.C.; LIBERTY LIFE ASSURANCE COMPANY OF BOSTON; ROBERT VOGEL, Esquire; CELIA JOSEPH, Esquire; ROYCE WARRICK, Esquire; MICHAEL McLAUGHLIN, Esquire; JANE GREENETZ; JAMES D. PAGLIARO, Esquire; PAUL J. GRECO, Esquire; P. DAFFODIL TYMINSKI, Esquire; ARETHA DELIGHT DAVIS, Esquire; NANCY J. GELLMAN, Esquire; KELLY G. HULLER, Esquire; LORI HAMLIN; DEANNA MAY; NANCY MAYO; ROHM & HAAS COMPANY BENEFITS ADMINISTRATIVE COMMITTEE; HARKINS CUNNINGHAM LLP; RAJ L. GUPTA; ROBERT A. LONERGAN, Esquire; ELLEN FRIEDELL, Esquire; WAYNE DAVIS; MARILYN ORR; WILLIAM O'BRIEN, Esquire; JOHN DOE NOS. 1-25, Respondents

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OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals is *Mark Jackson v. Rohm and Haas Company, et al.*, No. 09-1872 (3rd Cir. Feb. 22, 2010)(Fisher, J.). App. at 1a.[1] The decision is not reported. The decision affirmed the district court's decisions of March 19 and 20, 2009, which are unreported. App. at 15a-23a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Third Circuit's decision was entered on February 22, 2010. The sur petition for rehearing with suggestion for rehearing en banc was denied on March 18, 2010. App. at 110a.

RELEVANT PROVISIONS INVOLVED

Title 18, United States Code, Section 1964. App. at 112a.

STATEMENT

Petitioner has filed three separate cases against Rohm and Haas Company ("R&H"), the Liberty Life Assurance Company of Boston ("Liberty Mutual"), and others pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq.[2/3] The cases have come to be known within the

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[1]All references to the instant appendix are "App." All references to the appendix below are "COA App."

[2]Unless otherwise stated, all references to "petitioner" are to Mark Jackson.

[3]Not all cases and claims were brought against all defendants.

litigation as *Jackson I*, *Jackson II*, and *Jackson III*. In *Jackson I* (filed September 19, 2003), petitioner challenged the litigation misconduct of R&H in a prior state case.[4/5] On June 30, 2005, the district court dismissed the RICO claim on the ground that petitioner lacked RICO standing, and declined to exercise supplemental jurisdiction.[6] Thereafter, the case was transferred to state court for disposition of the state law claims.

In *Jackson II* (filed September 19, 2005) and *Jackson III* (filed August 18, 2006), petitioner filed complaints against the *Jackson I* defendants, their counsel in *Jackson I*, Liberty Mutual, certain R&H officers and directors (including R&H's chairman and general counsel), and others alleging, *inter alia*, violations of RICO and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq.[7] The respondents had continued the pattern of

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Liberty Life Assurance Company of Boston is a wholly-owned subsidiary of the Liberty Mutual Group.

[4] *Jackson v. Rohm and Haas Co.*, No. 03-5299 (E.D. Pa.).

[5] In June 1999, petitioner filed suit in Pennsylvania state court alleging invasion of privacy and defamation in connection with an R&H internal company investigation. During discovery, R&H produced a photocopy of the handwritten notes taken by Royce Warrick (R&H in-house counsel and one of the lead investigators), but the notes had been significantly altered. Thereafter, R&H produced a counterfeit "original" version of the notes. R&H relied upon both versions of the notes throughout discovery, trial and appeal, and Warrick offered perjured testimony concerning authenticity, all in a successful effort to defend R&H's investigation and to defeat petitioner's claims. COA App. at 184-87.

[6] *Jackson v. Rohm & Haas Co.*, No. 03-5299 (E.D. Pa. June 30, 2005). The Third Circuit affirmed. No. 06-1540 (3rd Cir. Feb. 26, 2007).

[7] *Jackson v Rohm and Haas Co.*, No. 05-4988 (E.D. Pa.)("Jackson

fraud and racketeering activity which included, *inter alia*, repeated instances of litigation misconduct connected to the fraudulent evidence (including petitioner's efforts to obtain discovery of the challenged documents), and repeated interference with petitioner's employment/benefits in an effort to gain an advantage in the litigation and to harm him. COA App. at 191, 200-01.

On September 5 and 13, 2007, the district court issued decisions granting in part and denying in part the respondents' motions to dismiss the *Jackson II* and *Jackson III* complaints, which permitted claims pursuant to RICO (18 U.S.C. § 1961, et seq.), RICO (conspiracy)(18 U.S.C. § 1962(d)), ERISA (breach of fiduciary duty)(29 U.S.C. § 1132(a)(3)), ERISA (breach of co-fiduciary duty)(29 U.S.C. § 1105), ERISA (denial of benefits)(29 U.S.C. § 1132(a)(1)(B)), ERISA retaliation (Section 510)(29 U.S.C. § 1140), fraud, and negligent misrepresentation. App. at 58a, 76a.

On May 20, 2008, the magistrate judge consolidated *Jackson II* and *Jackson III* and directed petitioner's counsel to file a consolidated amended complaint ("CAC") "alleging all claims for which he has a good faith basis." COA App. at 1229. On June 11, 2008, petitioner filed the CAC as directed. On July 2, 2008, the respondents moved to dismiss.

On December 16, 2008, the magistrate judge filed a report and recommendation ("R&R") recommending dismissal on the ground that the CAC constituted so severe a pleadings violation that the drastic sanction of dismissal was warranted. App. at 42a. This was a stunning development since the CAC merely consolidated two cases that had survived

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II"); No. 06-3682 (E.D. Pa.)("Jackson III").

dismissal, and updated the pleadings.[8] Petitioner filed timely and specific objections to the R&R. COA App. at 815, 1391.

On March 19, 2009, the district adopted (in substantial part) the R&R and dismissed 21 of 25 claims. App. at 20a. However, the district court did not perform a de novo review of the record based upon petitioner's objections, nor was petitioner afforded due process or reasonable discovery prior to the punitive dismissal of his claims. App. at 17a.

Motion for Preliminary Injunction

On July 10, 2008, R&H and The Dow Chemical Company ("Dow") announced that Dow would acquire all outstanding shares of R&H for $78.00 per share, or $18.8 billion. Previously, on April 23, 2008, Liberty Mutual Group ("LMG") and Safeco Insurance Company announced that LMG would acquire all outstanding shares of Safeco for $68.25 per share, or $6.2 billion. The transactions closed on April 1, 2009 and September 22, 2008 respectively.

On September 15, 2008, petitioner filed a motion for preliminary injunction to enjoin the transactions, and to require full and proper disclosures. In particular, the motion alleged that the *Jackson* cases had not been disclosed (as required) by the companies in relevant SEC/regulatory filings, including the proxy materials connected to the transactions. On November

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[8]For example, based upon the Summary Plan Description and certain correspondence obtained by petitioner, the CAC alleged that R&H and Liberty Mutual officials knowingly misrepresented the disability plan as an ERISA-governed plan even though it was funded from R&H's "general assets." COA App. at 246-47. *See* note 24, *infra*.

17, 2008, the magistrate judge issued an R&R recommending that the motion be denied. App. at 54a. On March 20, 2009, the district court (without opinion) adopted the R&R. App. at 15a.

On March 25, 2009, petitioner filed a Notice of Appeal with the Third Circuit.[9/10] On February 22, 2010, the Third Circuit affirmed. App. at 1a. On March 4, 2010, petitioners filed a petition for rehearing and rehearing en banc. On March 18, 2010, the petition was denied. App. at 110a.

REASONS FOR GRANTING THE PETITION

The magistrate judge "consistent with the Court's inherent power to manage cases before it" recommended dismissal of the CAC with prejudice under a *Poulis* analysis.[11] App. at 36a. The district court adopted (in substantial part) the R&R, and dismissed 21 of 25 claims. App. at 21a. In confirming the decision, the Third Circuit impermissibly and substantially lowered the established standard for a district court to punitively dismiss claims based upon a pleadings violation.

Where a court dismisses claims as a sanction pursuant to its inherent authority, a party is entitled to explicit notice and an opportunity to respond. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991)(cite

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[9]On March 24, 2009, petitioner voluntarily dismissed the remaining claims in the CAC.

[10]On April 17, 2009, the Notice of Appeal was amended to included petitioner's counsel as an appellant since the appeal challenges, *inter alia*, Rule 11 sanctions against petitioner's counsel.

[11]*Poulis v State Farm Fire and Cas. Co.*, 747 F.2d 863 (3rd Cir. 1984). In *Poulis*, the Third Circuit established a six-part test when considering a punitive dismissal.

omitted)(court "must comply with the mandates of due process" when exercising inherent power); *FEC v. Salvi*, 205 F.3d 1015, 1018-19 (7th Cir. 2000)(requiring explicit warning before dismissal). The Third Circuit determined that petitioner's attendance at a May 20, 2008 hearing concerning the consolidation of *Jackson II* and *III* was sufficient to place petitioner on notice, and to assign him personal responsibility for the CAC. App. at 11a-12a. However, the CAC (filed June 11, 2008) had not yet been filed and the possibility of a punitive dismissal was not a subject of the hearing. Further, no evidence was taken (and there is nothing in the record) concerning petitioner's possible role. *Chambers*, 501 U.S. at 70 ("Chambers [was] the 'strategist' for the abusive conduct"). This conflicts with the decisions of the Supreme Court and other circuit courts concerning the requirements for notice and personal responsibility before claims may be punitively dismissed.

The Third Circuit also determined (without elaboration) that "Jackson's refusal to abide by Judge Angell's last instructions regarding the CAC indicates that his counsel's conduct was willful or in bad faith[.]" App. at 11a. However, when exercising inherent authority, a court must make "specific findings as to the party's conduct that warrants sanctions." *Byrne v. Nezhat*, 261 F.3d 1075, 1123 (11th Cir. 2001)(cite omitted). Further, bad faith must be determined based upon a party's *own* actions. *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 650 (9th Cir. 1997). Therefore, this aspect of the decision conflicts with the decisions of other circuit courts.

It was improper for the court to rely upon inherent authority in the first instance. *Chambers* cautions against use of inherent power if appropriate sanctions can be imposed under specific rules. 501 U.S.

at 49 n.14 (cite omitted). In *Chambers*, the Supreme Court determined it was proper for the district court to rely on inherent power since the challenged conduct exceeded the scope of the rules. *Id.* at 50. However, the Third Circuit's decision *centers* on whether the CAC constitutes a sanctionable pleadings violation, which should have been evaluated pursuant to Rule 11. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) ("Rule 11 is to deter baseless filings[.]").

The Third Circuit also determined that, pursuant to Rule 72(b), the standard for de novo review is met based upon the district court's "review of the R&R and the parties' responses" thereto. App. at 10a. This conflicts with Supreme Court and other circuit court decisions that, where a party timely objects, the district court must review the actual record and issue its own findings. *See e.g. United States v. Raddatz*, 447 U.S. 667, 692 (1980)(Stewart, J., dissenting) ("*Normally*, the judge . . . will consider the record which has been developed before the magistrate and make his own determination on the basis of that record[.]")(emphasis in original).

On March 9, 2006, petitioner's counsel was sanctioned in connection with certain claims in the original *Jackson II* Complaint, and ultimately required to pay defense counsel two-thirds of their fees (totaling $81,710.99) in connection with their dismissal and Rule 11 motions. COA App. at 114, 132; 102. R&H's counsel submitted a petition for 527.9 hours, of which the court allowed more than 380 hours. Thus, the amount actually awarded was not based upon an evaluation of an offense and the requirements for deterrence, but the movants' petitions, which led to a compensatory award. *Elliott v. The M/V Lois B*, 980 F.2d 1001, 1007 (5th Cir. 1993)(Rule 11 is not to "compensate wronged parties.").

The court also stated that since the $80,000 fine was "unsuccessful," there were "no alternative sanctions" to dismissal. App. at 5a-6a, 8a-9a (cite omitted). However, since dismissal was only the second sanction in the case and the *first* against petitioner, the Rule 11 sanction was not the "minimum" required to "adequately deter" (*id.* at 8), but instead was a "last chance" prior to the punitive dismissal of claims. Accordingly, the Third Circuit's decision conflicts with the decisions of the Supreme Court and other circuit courts concerning the purpose and effect of Rule 11 sanctions.

Finally, petitioner filed a motion for preliminary injunction to enjoin the 2009 merger of R&H/Dow and the 2008 acquisition by LMG of Safeco. Petitioner challenged the companies' conduct in failing to disclose the fraud and racketeering cases in SEC and other regulatory filings, including the proxy solicitation and/or proxy materials used to secure shareholder/regulatory approval. *See e.g. TSC Indus. v. Northway*, 426 U.S. 438, 449 (1976) (the question is whether "the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder."). The Third Circuit dismissed the motion as moot on the grounds that petitioner's claims had been dismissed and the transactions had already closed. App. at 12a. However, the fact of the closings merely altered the form of relief; it did not foreclose petitioner from obtaining a remedy. *See e.g. Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 386 (1970) ("Possible forms of relief [for violation of the proxy rules] will include setting aside the merger[.]").

Where a private party has brought a claim for equitable relief under § 1964(a), there is a circuit split concerning the authority of the district court. *See e.g.*

NOW, Inc. v. Scheidler, 267 F.3d 687, 697 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003) (private plaintiff may obtain equitable relief under § 1964(a)); *Conkling v. Turner*, 18 F.3d 1285, 1296 & n.8 (5th Cir. 1994)(detailing circuit split). The circuit courts have also disagreed concerning the relief available under § 1964(a). *See e.g. United States v. Carson*, 52 F.3d 1173, 1181-82 (1995), *cert. denied*, 516 U.S. 1122 (1996) (permitting disgorgement under § 1964(a)); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1148-49 (D.C. Cir. 2009)(cite omitted) (rejecting disgorgement as remedy).

Thus, there is conflict among the circuit courts, and the Supreme Court has not yet determined either the district court's authority, or the relief available, where private parties have brought claims pursuant to § 1964(a). Further, in view of the nature and substance of the challenged transactions, and the substantial interests which are implicated, review should be granted on the basis that this is a matter of exceptional importance.

I. A REPRESENTED PARTY IS NOT PERSONALLY RESPONSIBLE FOR A PLEADINGS VIOLATION UNLESS THE PARTY PARTICIPATED IN, AND RECEIVED NOTICE OF, THE SANCTIONABLE CONDUCT

The Third Circuit determined that petitioner's attendance at the May 20, 2008 hearing concerning consolidation was "sufficient to put Jackson personally on notice" of a purported pleadings violation and "made him personally responsible for the CAC." App. at 11a-12a. However, the CAC (filed June 11, 2008) and the

respondents' dismissal motions (filed July 2, 2008) had not yet been filed, and the possibility of a punitive dismissal was not a subject of the proceeding.[12] Further, this is not the standard for personal responsibility.

The Third Circuit's decision conflicts with the decisions of the Supreme Court and other circuit courts concerning the adequacy of notice and the requirement(s) for personal responsibility.

A. PETITIONER WAS NOT PERSONALLY RESPONSIBLE FOR THE CAC

"Typically, sanctions are levied against a client when he misrepresents facts in the pleadings . . . [or] when it is clear that he is the 'mastermind' behind the frivolous case." *Byrne*, 261 F.3d at 1118 (cite omitted). *See also Chambers*, 501 U.S. at 70 ("Chambers [was] the 'strategist' for the abusive conduct"); *Independent Fire Ins. Co. v. Lea*, 979 F.2d 377, 379 (5th Cir. 1992)(represented party must be directly involved in the management of the litigation and/or the decisions resulting in the actions which the court sanctions).

The Third Circuit did not find that petitioner was the "mastermind" or "strategist" behind the challenged claims. In fact, there is no evidence concerning petitioner's possible role anywhere in the record. Further, at the May 20, 2008 hearing, the magistrate judge's instructions were directed to

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[12]The Order scheduling the May 20, 2008 hearing states, "The purpose of this hearing will be to schedule the filing of a proper complaint and response in this case, and to schedule and complete discovery in a prompt fashion." COA App. at 1226.

counsel, and only counsel could have evaluated and applied them:

> THE COURT: So, I am asking plaintiff's counsel to prepare a complaint which encompasses all the claims he believes in good faith he can raise before the Court based on whatever actions he believes the respondents have exerted against his client ... Whether it is twenty-two counts or thirty-five, I don't know. That is up to Mr. Silverberg[.]

COA App. at 1235-36, 1244; *Byrne*, 261 F.3d at 1118 (cite omitted)("such legal matters as the frivolousness of a claim . . . which are 'peculiarly within the province of lawyers,' would not, without specific findings implicating knowing participation, support Rule 11 sanctions against a party"); *Kirk Capital Corp. v. Bailey*, 16 F.3d 1485, 1488 (8th Cir. 1994)(the lawyer, and not his client, must decide if the claims made are warranted by existing law).

The Third Circuit's decision conflicts with the decisions of the Supreme Court and other circuit courts concerning the question of personal responsibility, and review should be granted to resolve the conflict on this important issue. Courts must afford the fullest procedural protections to innocent parties, particularly where the failure to do so results in the loss of a cause of action.

II. WHERE A COURT RELIES UPON ITS INHERENT POWER TO PUNITIVELY DISMISS A PARTY'S CLAIMS, THE COURT MUST FIRST PROVIDE EXPLICIT NOTICE AND AN OPPORTUNITY TO RESPOND

A. KNOWLEDGE OF A DELINQUENCY IS NOT EQUIVALENT TO NOTICE

In finding that "the May 20, 2008 hearing was sufficient to put Jackson personally on notice," the Third Circuit stated, "We have held that "[w]here a client had or should have had independent knowledge of the delinquency that was the grounds for dismissal, . . . notice and hearing are not required." App. at 11a-12a (cite omitted). This conflicts with the Supreme Court's standard concerning the adequacy of notice. *See Jones v. Flowers*, 547 U.S. 220, 233-34 (2006) (internal cites omitted)("An interested party's 'knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending.'"); *id.* (an arrestee's knowledge of the right to remain silent does not excuse a police failure to provide *Miranda* warnings). *See Chambers*, 501 U.S. at 50 (court "must comply with the mandates of due process" when exercising inherent power); *Salvi*, 205 F.3d at 1018-19 ("we have repeatedly emphasized the general rule that explicit warning must be given . . . prior to dismissal.").

Petitioner's attendance at the May 20, 2008 hearing was not "equivalent to notice" that his claims might be punitively dismissed, particularly since the CAC had not yet been filed and dismissal was not a subject of the proceeding. The Third Circuit's decision conflicts with the Supreme Court's decision in *Jones* concerning the adequacy of notice, and review should

be granted to resolve the conflict on this important issue.

B. A SHOW CAUSE ORDER SHOULD HAVE BEEN ISSUED

"[The] inherent power to sanction is to be exercised by means of a rule to show cause or similar procedure, rather than by the sudden imposition of sanctions with no opportunity to respond." *Larsen v. City of Beloit*, 130 F.3d 1278, 1286 (7th Cir. 1997), *citing Chambers*, 501 U.S. at 40, 50; Fed.R.Civ.P. 11, 1993 Amendments, Note to Subdivisions (b) and (c)(the court may act on its own initiative, "but with the condition that this be done through a show cause order.");[13] *Methode Elecs., Inc. v. Adam Techs., Inc.*, 371 F.3d 923, 928 (7th Cir. 2004)(cite omitted)(under inherent power, court must provide notice of intention to sanction and opportunity to respond); *Hutchinson v. Pfeil*, 208 F.3d 1180, 1184 (10th Cir. 2000)(cites omitted)("The courts have held this procedure to be mandatory, with noncompliance constituting an abuse of discretion requiring reversal."). Further, any show cause order must "specifically describ[e] the conduct implicating the rule[.]"[14] *Hutchinson*, 208 F.3d at 1184; *Hunter v.*

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[13]*See also Roadway Express, Inc v. Piper*, 447 U.S. 752, 767 (1980)(stating that notice and opportunity to be heard are generally required before awarding attorney's fees).

[14]*Shea v Donohoe Constr Co*, 795 F 2d 1071, 1078 (D.C. Cir. 1986)(district court "should notify the client, in clear and unequivocal terms, that his case is in danger of dismissal" due to his lawyer's conduct); *Dodson v Runyon*, 86 F.3d 37, 40 n.4 (2nd Cir. 1996)(district judges should give notice "directly to the client where there is reason to suspect" that attorney's conduct could result in dismissal).

Earthgrains Co. Bakery, 281 F.3d 144, 157 (4th Cir. 2002)(same).

The Third Circuit's decision conflicts with the decisions of the Supreme Court and other circuit courts concerning the requirements of due process. Further, where a court relies upon its inherent power to punitively dismiss claims, the court must first issue a show cause order detailing the alleged offense and offering the party a full and fair opportunity to respond to the threat of dismissal.

C. THE CAC SHOULD HAVE BEEN EVALUATED UNDER RULE 11

1. Petitioner Should Have Been Allowed Reasonable Discovery.

While petitioner's claims were dismissed under a *Poulis* analysis pursuant to the court's inherent authority, whether a sanctionable pleadings violation had occurred should have been evaluated pursuant to Rule 11. *Cooter & Gell*, 496 U.S. at 393 (the purpose of Rule 11 is to deter baseless filings). *Chambers* cautions against reliance upon inherent authority if appropriate sanctions can be imposed under specific rules. *Chambers*, 501 U.S. at 49 n.14, *citing Societe Internationale pour Participations Industrielles et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 207 (1958)("because individual rules address specific problems, in many instances it might be improper to invoke one when another directly applies."). In *Chambers*, the Supreme Court determined it was proper for the district court to rely on inherent power since the challenged conduct exceeded the scope of the rules (*id.* at 50), but the Third Circuit's decision *centers*

on whether the CAC constitutes a sanctionable pleadings violation. App. at 11a.

The court's reliance on inherent authority effectively bypassed Rule 11's express provision for discovery. Rule .11(b)(3)(addressing, *inter alia*, whether contentions are "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery"); Rule 11(b)(3), Advisory Committee Notes (discussing need for discovery to "confirm the evidentiary basis for the allegation."); *ATSI Communs., Inc. v. Shaar Fund, Ltd.*, 579 F.3d 143, 150 (2nd Cir. 2009)(discussing permitted discovery). This foreclosed petitioner from the opportunity to demonstrate that the allegations and claims were factually supported. In fact, there already was evidence to support petitioner's claims. For example, there already had been repeated interference with petitioner's efforts to obtain handwriting exemplars. *United States v. Flores*, 172 F.3d 695, 701 (9th Cir. 1999)("There are few better examples of a classic obstruction of justice than a defendant who refuses to give handwriting samples when compelled by a subpoena."). Further, based on handwriting exemplars provided by Royce Warrick and Jane Greenetz, petitioner would have been able to produce an expert report from a forensic document examiner that: a) both Warrick and Greenetz intentionally withheld their true handwriting in an effort to mislead petitioner's expert and others concerning the authenticity of the challenged documents; and b) Greenetz intentionally and repeatedly misspelled her name to match the spelling of her name on a challenged affidavit, which was misspelled "Greentz."[16/17] Thus,

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[16]Warrick is the purported author of certain handwritten interview

while the Third Circuit determined there had been bad faith, and that "Jackson's ERISA and RICO claims were without merit" (App. at 11a)(discussing fourth and sixth *Poulis* factors), there already was evidence of repeated instances of obstructive conduct.[18] *United States v. Porat*, 17 F.3d 660, 665 (3rd Cir. 1994)(submission of knowingly misleading handwriting exemplar a violation of 18 U.S.C. §1512(b)(1)).

The Third Circuit's decision conflicts with the decisions in *Chambers* and *Societe Internationale*, which make clear that inherent power should not be used where individual rules address specific problems. Further, the court's decision undercuts Rule 11's procedural protections, which are specifically tailored to pleadings offenses.[19]

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notes which petitioner claims are fraudulent, but which R&H contends are legitimate and has relied upon in its defense. Greenetz is the R&H paralegal who (according to R&H) located Warrick's "original" notes after they had been misplaced, and thereafter signed an affidavit to that effect. However, petitioner has contended the affidavit is a fraud since, *inter alia*, the notes were not misplaced, the affidavit is inconsistent with an Answer Greenetz filed, and the signature on the document was clearly misspelled "Greentz". *See* COA App. at 455 (Greenetz affidavit); *id.* at 458 (Greenetz verification).

[17]The exemplars were obtained in November 2007, more than 20 months after the Rule 11 decision.

[18]Relatedly, the Third Circuit determined that petitioner "bore personal responsibility for the CAC" and had repeatedly "fil[ed] improper complaints with frivolous claims[.]" *App at 11a* (discussing first, second, and third *Poulis* elements). As discussed *supra*, there was no evidence concerning petitioner's possible role in the proceedings, and further, the only time the district court determined that frivolous claims had been filed was the court's Rule 11 decision (filed March 9, 2006) in connection with the original *Jackson II* complaint.

[19] Fed.R.Civ.P. 11(c)(1)(A)(requiring notice and an opportunity to respond before sanctions may be imposed); *Radcliffe v. Rainbow*

III. A PUNITIVE DISMISSAL OF CLAIMS REQUIRES EXPLICIT FACTUAL FINDINGS OF BAD FAITH

The Third Circuit determined (without elaboration) that "Jackson's refusal to abide by Judge Angell's last instructions regarding the CAC indicates that his counsel's conduct was willful or in bad faith." App. at 11a (discussing fourth *Poulis* factor). This generalized statement conflicts with the decisions of the Supreme Court, as well as other circuit courts which require explicit factual findings of bad faith.[19]

A dismissal pursuant to the court's inherent power requires a finding of bad faith. *Chambers*, 501 U.S. at 49 ("invocation of the inherent power would require a finding of bad faith."); *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 242 (3rd Cir. 2007), *citing Roadway Express*, 447 U.S. at 765-766 (finding of bad faith is generally required for a court to impose sanctions pursuant to its inherent authority). However, "a court must do more than conclude that a party acted in bad faith; it should make specific findings as to the party's conduct that warrants sanctions." *Byrne*, 261 F.3d at 1123; *Toon v. Wackenhut Corr. Corp.*, 250 F.3d

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Constr Co, 254 F.3d 772, 788-89 (9th Cir. 2001)(Rule 11's "safe harbor" period is mandatory).

[19]The district court's Rule 11 decision expressly found no bad faith on the part of petitioner's counsel. COA App. at 131. The district court confirmed its decision when, after petitioner sought reconsideration, the respondents sought sanctions under 18 U.S.C. § 1927. Order (filed 06/28/06) at 2 ("As I stated in my March 9, 2006 opinion, I did not then perceive any willful misconduct by plaintiff's counsel, and I do not perceive any now."). In *Jackson III*, the district court denied respondents' Rule 11 motions, determining that petitioner's termination claims had not been brought for an improper purpose. Order (filed 09/06/07) at 4-5.

950, 952 (5th Cir. 2001)(to impose sanctions pursuant to inherent power a "court must make a specific finding of bad faith"). This generally requires a determination of a party's motive or intent. *Elm Haven Constr. Ltd. P'ship v. Neri Constr. LLC*, 376 F.3d 96, 102 (2nd Cir. 2004); *Sloan v. State Farm Mut. Auto. Ins. Co.*, 360 F.3d 1220, 1224 (10th Cir. 2004)(bad faith requires "culpable mental state").[20]

The Third Circuit's decision conflicts with the decision of other circuit courts which require explicit factual findings of bad faith conduct before sanctions may be imposed pursuant to the court's inherent authority. Accordingly, review should be granted to resolve the conflict on this important question.

A. BAD FAITH MUST BE DETERMINED BASED UPON A PARTY'S OWN ACTIONS

While the conduct of a party or attorney may establish willfulness, the actions of one may not be used to demonstrate the bad faith of the other. *Byrne*, 261 F.3d at 1123 ("To support its findings of bad faith and otherwise sanctionable conduct, the court impermissibly relied solely on the actions of counsel."); *Primus*, 115 F.3d at 650 (cite omitted)(sanctions against counsel should be based solely on his "own improper conduct without considering the conduct of the parties or any other attorney"); *Donaldson v. Clark*, 819 F.2d

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[20]"In fact, the magistrate judge directed her criticism at petitioner's counsel, and not at petitioner. ("[F]rankly, it is my position that your client is being ill served[.]"). COA App. at 880; *id.* (discussing the court's efforts to "facilitate this litigation on behalf of your client.")."

1551, 1557 n.6 (11th Cir. 1987)(court should not sanction parties for the offenses of their lawyers). In fact, pursuant to Rule 11(b)(2), the district court strictly limited the Rule 11 sanction to petitioner's counsel. COA App. at 130; *Chevron, USA, Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir. 1985)("Rule 11 directs that the sanction should fall upon the individual responsible for the filing of the offending document."); *see also Byrne*, 261 F.3d at 1120 n.88 (cite omitted)("We agree with the Eighth Circuit that "the principle enunciated by the Supreme Court in *Link* simply does not apply in a Rule 11 sanction context. Otherwise every award against an attorney under Rule 11 could also be assessed against the client.").

The Third Circuit's decision conflates the possible culpability of a party and counsel, and regardless, there is no showing that either petitioner or counsel acted in bad faith. This conflicts with the decisions of other circuit courts, and review should be granted to resolve the conflict on this important issue.

IV. PURSUANT TO RULE 72(b), THE DISTRICT COURT MUST REVIEW THE ACTUAL RECORD AND ISSUE ITS OWN FINDINGS

The Third Circuit confirmed the dismissal of petitioner's claims even though, pursuant to Rule 72(b) and 18 U.S.C. § 636(b), the district court did not independently review the record as developed based upon petitioner's objections to the R&R, and issue its own findings based upon the review. App. at 10a (district court's review of the R&R and the parties' responses thereto sufficient). This conflicts with the decisions of the Supreme Court and other circuit courts concerning the standard for de novo review.

"Article III requires *de novo* review of a magistrate judge's R&R where a party timely objects." *Nara v. Frank*, 488 F.3d 187, 194 (3rd Cir. 2007)(cite omitted). The term "de novo" means "the court should make an independent determination of the issues." *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967); *United States v. Raddatz*, 447 U.S. 667, 692 (1980)(Stewart, J., dissenting)("*Normally*, the judge . . . will consider the record which has been developed before the magistrate and make his own determination on the basis of that record. . . ." (cite omitted)(emphasis in original); *Dawson v. Marshall*, 555 F.3d 798, 799 (9th Cir. 2009)(cite and quotes omitted)(construing 18 U.S.C. § 636(b)(1)(C))("De novo review means that the reviewing court do[es] not defer to the lower court's ruling but freely consider[s] the matter anew, as if no decision had been rendered below."); *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 71 (3rd Cir. 2000)(cite omitted) (district court has "obligation to review de novo the actual evidence on objected-to findings[.]"); *Diaz v. United States*, 930 F.2d 832, 836 (11th Cir. 1991)(§ 636(b)(1) requires that the district court make an independent determination of the factual issues based on the record); *Gee v. Estes*, 829 F.2d 1005, 1008-09 (10th Cir. 1987)(internal cites omitted)(district court has "nondelegable authority" to review actual record, and not merely magistrate's report and recommendation).

The district court's March 19, 2009 decision reveals that the district court failed to make an independent review of the record based upon petitioner's objections to the R&R, and to issue its own findings based on that review. COA App. at 815 (objections); App. at 17a. This undercut Rule 72(b)'s purpose and protections. In fact, respondents' conduct

resulted in the allegations contained in the CAC, and further, discovery would have permitted petitioner to advance substantial evidence in support of his RICO, ERISA, and other claims. Importantly, since the record demonstrated a lack of due process, the district court's decision constituted an abuse of discretion and the Third Circuit should have performed a plenary review, but failed to do so. App. at 6a-7a; *Kirkland v. National Mortgage Network, Inc.*, 884 F.2d 1367, 1370 (11th Cir. 1989), *c.f. United States v. Kirschenbaum*, 156 F.3d 784, 792 (7th Cir. 1998)(in general, due process claims are reviewed de novo).

The Third Circuit's decision conflicts with the decisions of the Supreme Court and other circuit courts, as well as other Third Circuit cases, concerning the standard for de novo review. Accordingly, review should be granted to resolve the conflict on this important issue.

V. THE RULE 11 SANCTION WAS NOT FOR PURPOSES OF DETERRENCE, AND WAS IMPROPERLY USED TO TRUMP PETITIONER'S CLAIMS

On March 9, 2006, the district court determined that petitioner's counsel had violated Rule 11 in connection with certain claims in the original *Jackson II* complaint. As a sanction, petitioner's counsel was ordered to pay defense counsel two-thirds of their fees (and costs) in connection with their dismissal and Rule 11 motions, which totaled $81,710.99. App. at 8a. The Third Circuit's decision confirming the huge sanction conflicts with the decisions of the Supreme Court and other circuit courts concerning the purpose of Rule 11 sanctions.

"[T]he central purpose of Rule 11 is to deter baseless filings[.]" *Cooter & Gell*, 496 U.S. at 393; *Zuk v. Eastern Pa. Psychiatric Inst. of the Medical College*, 103 F.3d 294, 301 (3rd Cir. 1996), *citing* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1336 (2d ed. Supp. 1996)("The 1993 revision . . . makes clear that the main purpose of Rule 11 is to deter, not to compensate."). However, the amount awarded was not based upon an evaluation of petitioner counsel's offense and/or the penalty necessary for deterrence, but the fees/costs associated with defense counsels' motions. For example, R&H's counsel submitted a petition for 527.9 hours (totaling $153,754.50) in connection with their motions,[21] of which the court allowed more than 380 hours.[22] COA App. at 102-05. Thus, the amount actually awarded was based solely on an evaluation of defense counsel's bill, and was grossly disproportionate to petitioner counsel's offense. *Navarro-Ayala v. Nunez*, 968 F.2d 1421, 1427-28 (1st Cir. 1992)("overkill" in billing should not increase the respondent's burden); *see also Kirk Capital*, 16 F.3d at 1491 (the assertion that plaintiffs filed a patently frivolous complaint was inconsistent with the contention that it took 279.10 hours of legal work "to reveal what defendants contend is obvious"); *id.* (awarding 50 hours for dismissal and 25 hours for Rule 11 motions).[23]

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[21]Based upon the March 9, 2006 order (awarding two-thirds of fees) and a 10% client discount, this was adjusted by R&H's counsel to $101,874.49.

[22]Liberty Mutual's counsel submitted a separate petition for 69.7 hours, and ultimately was awarded $10,190.38 of the total award.

[23]The original *Jackson II* Complaint (which contained ten counts) subsequently was amended, survived dismissal (including claims for RICO, RICO conspiracy, and ERISA), and formed the basis for

The Third Circuit's decision improperly shifts the focus *away* from deterrence and *to* an evaluation of the movants' fees. *Elliott*, 980 F.2d at 1007 (Rule 11 is not to "compensate wronged parties."). Where attorney's fees *are* considered, deterrence must not be measured based upon a generic percentage of the movant' bill. *Amlong & Amlong, P.A. v. Denny's, Inc.*, 457 F.3d 1180, 1190 (11th Cir. 2006)(in context of § 1927 sanctions, "the dollar amount of the sanction must bear a financial nexus to the excess proceedings"). Otherwise, as here, an incongruous and disproportionate penalty may result, and the deterrent purpose of Rule 11 is lost.

The Third Circuit also determined that "'no alternative sanctions . . . will be effective' in light of the fact that the previous $80,000 fine was unsuccessful[.]" App. at 5a-6a, 8a-9a (cite omitted)(amount of sanction sufficient to satisfy fifth *Poulis* element). However, the punitive dismissal of claims was only the second sanction in the litigation, and the *first* against petitioner. Thus, the Rule 11 sanction was *not* the "minimum" to "adequately deter," (App. at 8a), but instead was a "last chance" prior to the punitive dismissal of claims. *Pope v. Federal Express*, 974 F.2d 982, 984 (8th Cir. 1992)(court should award the "least severe sanction that will adequately deter the undesirable conduct"); *Zocaras v. Castro*, 465 F.3d 479, 483 (11th Cir. 2006) (internal cite omitted)("[d]ismissal of a case with prejudice is considered a sanction of last resort").

The Third Circuit's decision conflicts with the Supreme Court's decision in *Cooter and Gell* and other circuit courts concerning the purpose of Rule 11 and

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the CAC.

any penalties awarded thereunder. Review should be granted to resolve the conflict on this important matter.

VI. THE THIRD CIRCUIT'S DECISION CONCERNING THE MOTION FOR PRELIMINARY INJUNCTION CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT

On July 10, 2008, R&H and Dow announced that Dow would acquire all outstanding shares of R&H for $78.00 per share, or $18.8 billion. Previously, on April 23, 2008, Liberty Mutual and Safeco announced that Liberty Mutual would acquire all outstanding shares of Safeco for $68.25 per share, or $6.2 billion. The transactions closed on April 1, 2009 and September 22, 2008 respectively.

On September 15, 2008, petitioner filed a motion for preliminary injunction to enjoin the two transactions, and to require full and proper disclosures. Petitioner challenged the companies' conduct in failing to disclose the fraud and racketeering cases in SEC and other regulatory filings, including the proxy solicitation and proxy materials used to secure shareholder/regulatory approval.[24] The motion was brought pursuant to RICO's "private attorneys general" standard, and specifically, 18 U.S.C. §1964(a) to prevent and restrain future violations of the Act. COA App. at 322.

The Third Circuit dismissed the motion as moot on the grounds that petitioner's claims had been

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[24]The CAC alleged that R&H's securities filings were part of, and facilitated, the longstanding pattern of fraud and racketeering activity. COA App. at 257-260.

dismissed and the transactions had already closed. App. at 12a. However, the motion was brought pursuant to § 1964(a) to prevent and restrain future violations of the Act. The fact of the closings merely altered the form of relief; it did not foreclose petitioner from obtaining a remedy.

A. THE SHAREHOLDER VOTES WERE BASED UPON FALSE OR MISLEADING PROXY SOLICITATIONS AND PROXY MATERIALS

"An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Indus. v. Northway*, 426 U.S. 438, 449 (1976). As the Supreme Court explained:

> It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

Id.; *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988)(cite omitted)(discussing standard in the proxy-solicitation context); *Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 92-93 (2nd Cir. 2010)(cite omitted)(a fact is material where "there is a substantial likelihood that a reasonable person would consider it important in deciding whether to buy or sell shares [of stock]."); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 248 (5th Cir. 2009) ("The omission of a known risk, its probability of materialization, and its anticipated magnitude, are usually material to any disclosure discussing the prospective result from a future course of action."); *General Electric Co. v. Cathcart*, 980 F.2d 927, 937 (3rd Cir. 1992)(pending litigation "involv[ing] proxy solicitations concerning mergers or similar transactions" considered material). Importantly, the *Jackson* litigation involved claims against certain R&H officers and directors.[25] Schedule 14A, Item 7(b), 17 C.F.R. § 240.14a-101 (proxy materials must disclose pending litigation(s) that are "material to an evaluation of the ability or integrity of any director [up for election]"); *General Electric*, 980 F.2d at 937 (discussing failure to disclose, and materiality of, pending lawsuits against "director nominees.").

It is manifest that there is a "substantial likelihood that a reasonable shareholder" would consider fraud and racketeering claims involving a party to a merger, and a related motion for preliminary

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[25]In addition to Gupta and Robert Lonergan (R&H General Counsel), the R&H Benefits Administrative Committee ("BAC") was a named defendant, which was comprised of R&H officers/directors.

injunction to enjoin the transaction, "important in deciding how to vote." *TSC Indus.*, 426 U.S. at 449.

1. Respondents Intentionally Omitted Material Information For Purposes of Securing the Shareholder Votes Necessary to Approve the Transactions.

According to the proxy materials, on November 12, 2007, a trustee for the Haas trusts informed R&H Chairman Raj L. Gupta that "as a result of their fiduciary obligations, the Haas trustees had reached a consensus that the Haas trusts should diversify their holdings . . . through the sale of Rohm and Haas stock held by them [] in a 12 to 18 month time frame, at a premium to the market price."[26] COA App. at 358. The Haas trusts held 64,000,000 shares, or approximately 32%, of R&H's outstanding common stock. *Id.* This led to the auction of R&H, and ultimately, the merger with Dow.[27] *Id.* On September 26, 2008, in definitive proxy

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[26]At that point (and for many years prior thereto), the company's board of directors included two members of the Haas family. COA App. at 358.

[27]No further explanation was given for the Haas Family's decision, or for why the stated interest to "diversify" proved to be a divestiture. However, the November 2007 meeting between the representative of the Haas trusts and Gupta occurred shortly after the district court's September 2007 decisions permitting fraud and racketeering claims against R&H, and the Company's unsuccessful effort to block the handwriting exemplar of Royce Warrick. Importantly, in September 2007 (as the result of a share repurchase program), there was an undisclosed change in control which placed control of R&H in the hands of the Haas Family and two institutional investors. This further undercut the legitimacy of the merger since, although the Haas Family voted in favor of the merger, the undisclosed change in control legally prevented the

materials (including a letter signed by Gupta), the R&H board of directors unanimously recommended that R&H shareholders vote in favor of the merger with Dow.[28] Def. Proxy (filed 09/26/08). However, the board had intentionally failed to disclose the pending fraud and racketeering cases, or related motion for preliminary injunction.

In determining that statements by directors meet the standard for materiality within the meaning of *TSC Industries, Inc.*, the Supreme Court stated:

> We think there is no room to deny that a statement of belief by corporate directors about a recommended course of action, or an explanation of their reasons for recommending it, can take on just that importance. ... [T]he shareowner faced with a proxy request will think it important to know the directors' beliefs about the course they recommend and their specific reasons for urging the stockholders to embrace it.

Va. Bankshares v. Sandberg, 501 U.S. 1083, 1090-91 (1991)(cites omitted); *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp.*, 320 F.3d 920, 935 (9th Cir. 2003)(omission was material where airline painted a rosy picture of financial prospects, while knowing it had undisclosed specific problems); *Rubinstein v. Collins*, 20 F.3d 160, 170 (5th Cir. 1994)(optimistic statements that omit

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shares from being voted. COA App. at 359-61, 419-22.

[28]R&H filed proxy soliciting materials on multiple occasions in connection with the merger in which the company failed to make the required disclosures.

known substantial adverse facts are actionable under antifraud provisions).

The R&H board of directors unanimously recommended that R&H shareholders vote in favor of the merger with Dow, but intentionally failed to disclose the pending fraud and racketeering cases and related motion to enjoin the transaction. This met the standard for materiality within the meaning of *Va. Bankshares.*[29]/[30]

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[29]In press reports, Dow's Chairman significantly contributed to the effort to mislead R&H shareholders:

> An exuberant Dow Chemical chief executive Andrew N. Liveris said he paid a "full price" for Rohm & Haas because he considered it "beachfront property" and a "jewel" and because he couldn't pass on the opportunity. ... "*It didn't happen because Rohm & Haas was distressed,*" Liveris said.

COA App. at 494-95 (emphasis supplied).

[30]With respect to Liberty/Safeco, in proceedings before the Washington State Insurance Commissioner concerning the motion for preliminary injunction, the following colloquy took place between the Insurance Commissioner, Richard P. Quinlan (Liberty Mutual Sr. V.P. and Deputy General Counsel), petitioner's counsel, and possibly Sean B. McSweeney (Liberty Mutual Sr. V.P. and Deputy General Counsel):

> JUDGE PETERSEN: And so you don't believe that [the *Jackson*] case is material to Liberty?
>
> UNIDENTIFIED MALE: I do not.
>
> MR. SILVERBERG: Under what criteria? That means the proxy statement is bad. ...
>
> MR. QUINLAN: This transaction was reviewed, in addition to yours, six other jurisdictions, and including Washington, no one has ever concluded, we've been

2. Materiality is a Question of Fact.

Whether the proxy solicitation or proxy materials were materially false or misleading is a jury question. *Brody v. Stone & Webster, Inc.*, 414 F.3d 187, 209 (1st Cir. 2005), *citing TSC Industries, Inc.*, 426 U.S. at 450 (the falsity of a statement and the materiality of a false statement are questions for the jury); *In re Adams Golf, Inc. Secs. Litig.*, 381 F.3d 267, 274-75 (3rd Cir. 2004)(materiality is ordinarily an issue left to the factfinder). *See also Millowitz v. Citigroup Global Markets, Inc.*, 544 F.3d 474, 482 (2nd Cir. 2008), *citing*

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through market conduct exams that you've heard about ad nauseam, we're in a heavily regulated industry, never has anyone suggested that the business practices of Liberty Mutual are of a RICO nature.

JUDGE PETERSEN: Have you disclosed this case to any other, have you disclosed the fact of this litigation to any other states?

UNIDENTIFIED MALE: No.

COA Supp. App. at 39-40; *id.* at 37 (MR. QUINLAN: This litigation [] is not deemed to be material to Liberty Mutual's operations and its business and going forward.). As James Williams (Safeco's merger counsel) candidly admitted, "[Q]uite frankly Safeco knew nothing about this case at all until we saw these papers this morning. So without knowledge of existence of the litigation I find it hard to believe how Safeco could be held to a duty to disclose." *Id.* at 36. The Washington State Insurance Commissioner was the lead regulator among the following states: Oregon, California, Texas, Illinois, Indiana, and Missouri. *See* 18 U.S.C. § 1515(a)("As used in sections 1512 and 1513 [] the term 'official proceeding' means . . . a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency . . . whose activities affect interstate commerce[.]").

Basic, 485 U.S. at 236 (cite omitted)("'[T]he determination of materiality requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those facts to [the shareholder].'").

In sum, the Third Circuit's decision rewards companies who successfully rush their illegitimate transactions to closing before they can be properly challenged.[31] The Third Circuit's analysis and decision conflicts with the decisions of the Supreme Court in *TSC Indus.* and *Basic*, and other circuit courts when evaluating mergers/acquisitions. Further, in view of the nature and substance of the transactions, and the substantial interests which are implicated, review should be granted on the basis that this is a matter of exceptional importance.

B. A PRIVATE PARTY MAY OBTAIN EQUITABLE RELIEF UNDER §1964(a)

Petitioner's motion has been brought pursuant to RICO's "private attorneys general" standard and, in particular, 18 U.S.C. § 1964(a) to prevent and restrain future violations of the Act. *Rotella v. Wood*, 528 U.S. 549, 557 (2000)(RICO has the "congressional objective of encouraging civil litigation to supplement

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[31]The announcement of the Liberty/Safeco transaction came one day after the district court denied without prejudice all outstanding motions in *Jackson II* and *III*, which confirmed to Liberty that the cases/claims would be proceeding, and led to the May 2008 consolidation order. On September 18, 2008, three days after petitioner's motion for injunctive relief was filed, Liberty and Safeco issued a joint press release announcing that closing would occur September 22, 2008. COA App. at 1402.

Government efforts to deter and penalize the respectively prohibited practices."); *id.* ("The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity."). Section 1964(a) provides for equitable relief, although there is a conflict concerning the district court's authority where claims are brought by private parties. *See e.g. NOW*, 267 F.3d at 697 (private plaintiff may obtain equitable relief under §1964(a)); *Conkling*, 18 F.3d at 1296 & n.8 (detailing circuit split).

The Supreme Court has not yet decided the question, but has addressed standing in the context of a private plaintiff's ability to obtain civil penalties. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)("[I]t is wrong to maintain that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties. ... To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs[.]"). These same principles apply here.

Accordingly, review should be granted to resolve the conflict among the circuit courts. Further, this is a question of exceptional importance since it goes to the district court's authority to fashion appropriate remedies under RICO.

C. THE DISTRICT COURT HAS THE AUTHORITY TO AWARD THE FULL RANGE OF EQUITABLE REMEDIES UNDER § 1964(a)

1. The Mergers Should Be Set Aside and Respondents Should Be Disgorged of Ill-gotten Gains.

Since the mergers have closed, the proper remedy for a violation of the proxy rules is to set aside the transactions.[32] *Mills*, 396 U.S. at 386 ("Possible forms of relief [for violation of the proxy rules] will include setting aside the merger or granting other equitable relief[.]"). In addition, those responsible for (and who benefitted from) the false and misleading proxy solicitation materials should be disgorged of their ill-gotten gains.

One of the principal functions of equitable relief under RICO "is to divest the association of the fruits of its ill-gotten gains." *United States v. Turkette*, 452 U.S. 576, 585 (1981). *See also Porter v. Warner Holding Co.*, 328 U.S. 395, 398-399 (1946)(traditional equitable remedies include orders to "disgorge profits" resulting from statutory violations); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960)(discussing "historic power of equity to provide complete relief"). Indeed, the purpose of disgorgement "is not to compensate the victims of fraud, but to deprive the wrongdoer of his ill-gotten gain[.]" *FTC v. Gem*

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[32]While the Third Circuit denied petitioner's motion as moot, "the vote which utilized the allegedly fraudulent proxy materials continues to have effect." *Reschini v. First Fed. Sav. & Loan Ass'n*, 46 F.3d 246, 250 n.4 (3rd Cir. 1995).

Merchandising Corp., 87 F.3d 466, 470 (11th Cir. 1996); *SEC v. Cavanagh*, 445 F.3d 105, 117 (2nd Cir. 2006) (disgorgement "has the effect of deterring subsequent fraud."); *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)(observing that "disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws").

Both the Second and Fifth Circuits have determined that disgorgement is a permitted remedy under RICO. *Carson*, 52 F.3d at 1181-82 (disgorgement is among the equitable powers available to the district court under Section § 1964(a)); *Richard v. Hoechst Celanese Chemical Group, Inc.*, 355 F.3d 345, 354-55 (5th Cir. 2003), *cert. denied*, 543 U.S. 917 (2004)(same); *but see Philip Morris*, 566 F.3d at 1148-49 (cite omitted)(rejecting disgorgement as a remedy under § 1964(a)). Thus, there is a conflict between the circuits concerning the question of disgorgement, and more generally, the scope of relief available under § 1964(a).

Under the text of RICO, the decisions in *Mills*, *Turkette*, *Carson* and *Hoechst*, and consistent with the Court's prior decisions in *Porter* and *Mitchell*, the district court has the equitable power to set aside the mergers and to "divest [each] association of the fruits of its ill-gotten gains." *Turkette*, 452 U.S. at 585. Here, the illegitimate transactions have enabled respondents to grow their racketeering enterprise(s) and to reap huge financial gains. This cannot be reconciled with RICO's objectives to "deter and penalize the respectively prohibited practices" and "eliminat[e] racketeering activity." *Rotella*, 528 U.S. at 557.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that their petition be granted.

Respectfully submitted,
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(any footnotes trail end of each document)

No. 09-1872
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MARK JACKSON

v.

ROHM & HAAS COMPANY; MORGAN LEWIS & BOCKIUS LLP; CONRAD O'BRIEN GELLMAN & ROHN, P.C.; LIBERTY LIFE ASSURANCE COMPANY OF BOSTON; ROBERT VOGEL, Esquire; CELIA JOSEPH, Esquire; ROYCE WARRICK, Esquire; MICHAEL McLAUGHLIN, Esquire; JANE REENETZ; JAMES D. PAGLIARO, Esquire; PAUL J. GRECO, Esquire; P. DAFFODIL TYMINSKI, Esquire; ARETHA DELIGHT DAVIS, Esquire; NANCY J. GELLMAN, Esquire; KELLY G. HULLER, Esquire; LORI HAMLIN; DEANNA MAY; NANCY MAYO; ROHM & HAAS COMPANY BENEFITS ADMINISTRATIVE COMMITTEE; HARKINS CUNNINGHAM LLP; RAJ L. GUPTA; ROBERT A. LONERGAN, Esquire; ELLEN FRIEDELL, Esquire; WAYNE DAVIS; MARILYN ORR; WILLIAM O'BRIEN, Esquire; JOHN DOE NOS. 1-25, Mark Jackson; Richard J. Silverberg, Appellants (Pursuant to F.R.A.P. 12(a))

January 25, 2010, Submitted Pursuant to Third Circuit LAR 34.1(a)
February 22, 2010, Filed

NOTICE: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

On Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. No. 05-cv-04988).

COUNSEL: For MARK JACKSON, Plaintiff Appellant: Richard J. Silverberg, Esq., Richard J. Silverberg & Associates, Philadelphia, PA.

For LIBERTY LIFE ASSURANCE CO OF BOSTON, LORI HAMLIN, NANCY MAYO, Defendants - Appellees: Jason P. Gosselin, Esq., Michael J. Miller, Esq., Grant Nichols, Esq., Daniel B. Scott, Esq., Drinker, Biddle & Reath, Philadelphia, PA.

For ROHM & HAAS DEFENDANTS, Defendant. - Appellee: John G. Harkins, Jr., Esq., Colleen H. Simpson, Esq., Harkins Cunningham, Philadelphia, PA.

For RICHARD J. SILVERBERG, Esq., Appellant: Richard J. Silverberg, Esq., Richard J. Silverberg & Associates, Philadelphia, PA.

JUDGES: Before: FUENTES and FISHER, Circuit Judges, and CONNER, * District Judge.*

OPINION OF THE COURT

FISHER, *Circuit Judge.*

Mark Jackson ("Jackson") appeals from several orders of the United States District Court for the Eastern District of Pennsylvania imposing Rule 11 sanctions; denying his motion to disqualify the main defendant's counsel; dismissing with prejudice claims as a sanction; denying his motion for a preliminary injunction; and denying his motion to vacate the reference to Magistrate Judge M. Faith Angell. For the reasons stated herein, we will affirm.

I.

We write exclusively for the parties, who are familiar with the factual context and legal history of this case. Therefore, we will set forth only those facts necessary to our analysis.

This case's lengthy history begins in state court. In 1999, Jackson filed an invasion of privacy suit against his employer, Rohm and Haas Company ("Rohm and Haas"), in the Pennsylvania Court of Common Pleas of Philadelphia County. The ultimate outcome was not favorable to Jackson: although the jury awarded Jackson $ 150,000 in damages, the trial court granted Rohm and Haas' motion for judgment notwithstanding the verdict based on its determination that the Pennsylvania Workers' Compensation Act barred Jackson's privacy claim.

On September 19, 2003, shortly after the Pennsylvania Superior Court affirmed the trial court's decision,

Jackson filed suit against Rohm and Haas and its attorneys in federal court, asserting violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and related common law claims based on the defendants' alleged misconduct during the state court proceedings *("Jackson I")*. Finding that Jackson lacked standing to bring the RICO claim, the District Court dismissed the complaint on June 30, 2005.

On September 19, 2005, Jackson filed a second complaint *("Jackson II")* against a longer list of defendants, including Harkins Cunningham LLP ("Harkins"), the law firm that represented Rohm and Haas in *Jackson I*, and Liberty Life Assurance Company of Boston ("Liberty Life"), which allegedly suspended Jackson's disability benefits during his state and federal litigation in order to harass and intimidate him. The defendants responded with a Rule 11 motion for sanctions. On March 9, 2006, the District Court determined that the *Jackson II* complaint was "unwarranted and frivolous within the meaning of Rule 11(b)(2)" and sanctioned Jackson in the amount of two-thirds of the expenses and attorney's fees reasonably incurred by the defendants in preparing the Rule 11 motion and related motions to dismiss. (App. at 123, 132.) Magistrate Judge Angell calculated the amount to be $ 81,710.99, and the District Court adopted the sum.

Jackson proceeded to file a third federal complaint *("Jackson III")*, and, on April 21, 2008, the District Court referred the protracted litigation to Judge Angell.[1] Judge Angell required the represented parties to attend, with counsel, a hearing held on May 22, 2008. At the hearing, Judge Angell expressed concerns regarding Jackson's counsel's litigation tactics and

ordered Jackson to consolidate his second and third federal lawsuits into a single Consolidated Amended Complaint ("CAC") that would allege only those claims for which Jackson had a good faith basis. Although Judge Angell did not put a page limit on the CAC, she did caution, "I would hesitate if I saw a consolidated document that was a hundred pages or more." *(Id.* at 1240.)

On June 11, 2008, Jackson filed the CAC -- it was 152 pages long and asserted 25 counts against 51 defendants, 25 of whom were "John Does." The defendants filed a motion to dismiss the CAC with prejudice, and Judge Angell issued an R&R recommending that the motion be granted. Judge Angell found that the CAC's length, its failure to make allegations against specific defendants, and its "inflammatory and unwarranted conclusory allegations" violated Federal Rule of Civil Procedure 8 and, by thwarting her prior orders, also Rule 41(b). *(Id.* at 135.) Applying our decision in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984), Judge Angell concluded that at least five of the six *Poulis* factors weighed in favor of dismissal: (1) Jackson's presence at the May 22, 2008 hearing made him personally responsible for the CAC (App. at 146); (2) the defendants were prejudiced by having to answer ten complaints with claims that were frivolous and broad in scope *(id.* at 147); (3) Jackson's "pattern of continued failure to file a proper complaint" created a history of dilatoriness *(id.* at 148-49); (4) Jackson's refusal to file a proper CAC as directed "can only be viewed as willful or in bad faith" *(id.* at 149); and (5) "no alternative sanctions . . . will be effective" in light of the fact that the previous $ 80,000 fine was unsuccessful

(id.). On March 19, 2009, the District Court adopted only part of the R&R: the Court dismissed with prejudice 21 of the 25 claims in the CAC but, applying the sixth *Poulis* factor, allowed those few claims that the Court viewed as having colorable merit. *(Id.* at 73-74.)

Finally, Jackson filed three additional motions in the District Court that are relevant to this appeal. First, prior to filing the CAC, Jackson filed a motion to disqualify Harkins. Judge Angell denied the motion, and the District Court confirmed the denial on March 20, 2009. Second, after filing the CAC, Jackson filed a motion for a preliminary injunction to enjoin both the merger between Rohm and Haas and The Dow Chemical Company, and the acquisition of Liberty Life by Safeco Insurance Company. The District Court adopted Judge Angell's R&R and denied Jackson's motion on March 20, 2009. Lastly, Jackson filed a motion to vacate the reference to Judge Angell pursuant to 28 U.S.C. § 636(c)(4), alleging bias. On March 19, 2009, the District Court denied the motion: "[T]he record demonstrates not that Judge Angell has failed to conduct the extended and elaborate proceedings capably, but, rather, that the plaintiff, through his counsel, has handled his role in the proceedings in a continuously counterproductive manner. Judge Angell has fulfilled her responsibilities impeccably." *(Id.* at 69.)

II.

The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We review the District Court's

imposition of Rule 11 sanctions for abuse of discretion. *Rogal v. Am Broad Cos., Inc.*, 74 F.3d 40, 44 (3d Cir. 1996). The same standard applies to the District Court's dismissal of a claim as a sanction, *see Poulis*, 747 F.2d at 868,[2] and the District Court's denial of a motion to vacate pursuant to § 636(c)(4), *see Selkridge v. United of Omaha Life Ins Co.*, 360 F.3d 155, 166, 45 V.I. 712 (3d Cir. 2004). We review the District Court's denial of a motion to disqualify an attorney for abuse of discretion unless we are asked to determine whether a disciplinary rule prohibits certain professional conduct, in which case review is plenary. *United States v. Miller*, 624 F.2d 1198, 1201 (3d Cir. 1980). Finally, "we use a three-part standard to review a District Court's decision to grant or deny a preliminary injunction." *Rogers v. Corbett*, 468 F.3d 188, 192 (3d Cir. 2006). "The District Court's findings of fact are reviewed for clear error, the District Court's conclusions of law are evaluated under a plenary standard, and the ultimate decision to grant the preliminary injunction is reviewed for abuse of discretion." *Id.*

III.

Jackson challenges all of the above-mentioned orders by the District Court. Jackson argues that the District Court abused its discretion in granting the defendants' motion for Rule 11 sanctions; erred in denying Jackson's motion to disqualify Harkins; abused its discretion in dismissing with prejudice 21 of the 25 claims raised in the CAC; erred in denying Jackson's motion for a preliminary injunction; and abused its discretion in denying Jackson's motion to vacate the reference to Judge Angell. We will address these contentions in turn, in approximate chronological order.

A.

The District Court levied Rule 11 sanctions against Jackson in the amount of $ 81,710.99 after determining that "Jackson's claims in his original *Jackson II* complaint are predominantly without warrant and frivolous." (App. at 130.) On appeal, Jackson argues that the District Court should not have sanctioned his counsel and that, even if sanctions were appropriate, the amount awarded was excessive.

By filing a complaint, an attorney certifies that, to the best of his or her "knowledge, information, and belief," "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2). If it appears that an attorney has violated this rule, opposing counsel may file a motion for sanctions and, "[i]f warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion." Fed. R. Civ. P. 11(c)(2). We have held that a "district court's choice of deterrent is appropriate when it is the *minimum* that will serve to *adequately* deter the undesirable behavior" and that district courts should consider "whether the attorney has a history of this sort of behavior, the defendant's need for compensation, the degree of frivolousness, and the 'willfulness' of the violation." *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa.*, 103 F.3d 294, 301 (3d Cir. 1996) (emphasis in original) (quotations and citations omitted).

The *Jackson II* claims brought pursuant to RICO and 42 U.S.C. § 1985 were completely without merit, and

Jackson's brief provides no sound arguments to the contrary. Accordingly, we find that the District Court did not abuse its discretion in imposing Rule 11 sanctions. In light of the frivolousness of these claims and the defendants having incurred expenses in defending against them, we also find that the District Court acted reasonably in sanctioning Jackson's counsel in the amount of two-thirds of the defendants' expenses. *See Zuk*, 103 F.3d at 301.

B.

The District Court also denied Jackson's motion to disqualify Harkins, Rohm and Haas' counsel. In challenging this order, Jackson cites alleged conflicts of interest between the defendants represented; a "pattern of obstructive conduct;" "the improper assertion of attorney-client privilege;" and "disciplinary violations." (Appellants' Br. at 91.)

We have held that a court may disqualify an attorney only when "disqualification is an appropriate means of enforcing the applicable disciplinary rule[,]" keeping in mind "any countervailing policies, such as permitting a litigant to retain the counsel of his choice and enabling attorneys to practice without excessive restrictions." *Miller*, 624 F.2d at 1201. Here, Jackson's conclusory allegations, which are not backed by evidence, do not warrant the extreme remedy of attorney disqualification. Therefore, we find that the District Court did not err in denying Jackson's motion to disqualify Harkins from this case.

C.

Perhaps most critical to this appeal, Jackson contends that the District Court erred in dismissing 21 of the 25 claims in the CAC. Jackson's argument is three-fold. First, Jackson asserts that the District Court failed to make "an independent assessment of the record based upon plaintiff's objections to the R&R" (Appellants' Br. at 15), as required by Federal Rule of Civil Procedure 72(b), which states, "The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). *See also* 28 U.S.C. § 636(b)(1). There is no support for this contention in the record: the District Court not only issued its own opinion (App. at 70-74), but explicitly stated in its order that it reviewed both the R&R and the parties' responses (*id.* at 75.). Having reviewed the R&R, the District Court was permitted to adopt the R&R in part. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."). Therefore, we do not find that the District Court failed to make an independent assessment of the record.

Second, Jackson contends that Magistrate Judge Angell and the District Court erred in the *Poulis* analysis. Under *Poulis*, we determine whether the District Court abused its discretion in using dismissal as a sanction by examining the following factors: "(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the

meritoriousness of the claim or defense." 747 F.2d at 868. "[N]ot all of the *Poulis* factors need be satisfied in order to dismiss a complaint." *Mindek v. Rigatti*, 964 F.2d 1369, 1373 (3d Cir. 1992). Rather, "the decision to dismiss constitutes an exercise of the district court judge's discretion and must be given great deference by this Court–a court which has had no direct contact with the litigants and whose orders, calendar, docket and authority have not been violated or disrupted." *Id.*

We do not find that the District Court abused its discretion in its dismissal of the 21 CAC claims: (1) Jackson bore personal responsibility for the CAC after the May 20, 2008 hearing; (2)-(3) Jackson's repeated filing of improper complaints with frivolous claims prejudiced the defendants and illustrates a history of dilatoriness; (4) Jackson's refusal to abide by Judge Angell's last instructions regarding the CAC indicates that his counsel's conduct was willful or in bad faith; (5) the continuation of improper conduct after the imposition of the $ 80,000 fine demonstrates that any sanction other than dismissal would have likely been ineffective; and (6) Jackson's ERISA and RICO claims were without merit. Jackson's litany of arguments to the contrary are simply not convincing.[3]

Finally, Jackson argues that he was entitled to notice and a hearing pursuant to *Dunbar v. Triangle Lumber & Supply Co.*, 816 F.2d 126, 129 (3d Cir. 1987). We have held that "[w]here a client had or should have had independent knowledge of the delinquency that was the grounds for dismissal, . . . notice and hearing are not required." *Adams v. Trs. of N.J. Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 872 (3d Cir. 1994).

Here, the May 20, 2008 hearing was sufficient to put Jackson personally on notice.

In summary, we find that the District Court did not err in dismissing 21 of the 25 claims in the CAC.

D.

Jackson also argues that the District Court erred in denying his motion for a preliminary injunction to enjoin the merger involving Rohm and Haas, and the acquisition involving Liberty Life, based on the defendants' alleged failure to disclose the three *Jackson* cases to the Securities and Exchange Commission. We will dismiss this claim as moot. We have stated that "a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216 (3d Cir. 2003) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969)) (quotations and alteration omitted). Here, the claims underlying the preliminary injunction have been dismissed with prejudice. *See* Section C, supra. Moreover, the merger and acquisition have already occurred. *See Scattergood v. Perelman*, 945 F.2d 618, 621 (3d Cir. 1991) ("The merger has taken place, and this court has held on numerous occasions that when the event sought to be enjoined in a preliminary injunction has occurred, an appeal from the order denying the preliminary injunction is moot.").

E.

Finally, Jackson challenges the District Court's refusal

to vacate the reference to Judge Angell. Jackson argues that Judge Angell "demonstrated a severe bias in favor of defendants and against plaintiff;" failed to follow proper procedure; and "engaged in a course of conduct. . . . which appeared to facilitate [Rohm and Haas] and Liberty [Life] in completing their respective transactions." (Appellants' Br. at 71.)

"The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge[.]" 28 U.S.C. § 636(c)(4). Here, we see nothing warranting a finding of "extraordinary circumstances." *See Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1356 (3d Cir. 1990) ("Disagreement with a judge's determinations certainly cannot be equated with the showing required to so reflect on his impartiality as to dictate recusal."). *See also United States v. Wecht*, 484 F.3d 194, 217 (3d Cir. 2007) (holding that district courts have wide discretion in the management of their cases). If anything, Judge Angell demonstrated the utmost patience with Jackson in light of his counsel's intractable conduct.

IV.

For the foregoing reasons, we will affirm the orders of the District Court.

Footnotes

*Honorable Christopher C. Conner, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

[1]Prior to the referral, Jackson filed multiple amended complaints, and the defendants responded with multiple motions to dismiss.

[2]Likewise, we review the District Court's dismissal of a claim pursuant to Federal Rules of Civil Procedure 41(b) and 8 for abuse of discretion. *Emerson v. Thiel Coll.*, 296 F.3d 184, 190 (3d Cir. 2002); *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 702 (3d Cir. 1996)

[3]For example, Jackson contends that the first *Poulis* factor requires more than his requested presence at hearings, but he sets forth no case law in support of this proposition. Jackson also argues that Judge Angell improperly considered counsel's behavior during all three federal cases, even though the cases were related, partly consolidated, and against the same defendants.

Civil Action No. 05-4988

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK JACKSON, Plaintiff,

v.

ROHM & HAAS COMPANY, et al., Defendants.

March 20, 2009, Decided
March 20, 2009, Filed

Louis H. Pollak, United States District Judge.

ORDER

AND NOW, this 20th day of March, 2009, upon consideration of the pleadings and record herein, and after review of the Report and Recommendation of M. Faith Angell, United States Magistrate Judge, as well as objections submitted by plaintiff, it is hereby ORDERED that:

1. The Report and Recommendation (Docket No. 211) is APPROVED and ADOPTED.

2. Plaintiff's Objections (Docket No. 220) are OVERRULED.

3. Plaintiff's Motion for Preliminary Injunction To Enjoin The Merger Between Rohm and Haas Company And The Dow Chemical Company And The Acquisition Of Safeco Insurance Company

by The Liberty Mutual Group And To Require Full And Proper Disclosures (Docket No. 184) is DENIED.

4. Plaintiff's Motion for Leave to File a Supplemental Memorandum (Docket No. 246) is DENIED as moot.

BY THE COURT:

/s/ Louis H. Pollak, J.
POLLAK, J.

Civil Action No. 05-4988

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK JACKSON, Plaintiff,

v.

ROHM & HAAS COMPANY, et al., Defendants

March 19, 2009, Decided
March 19, 2009, Filed

Louis H. Pollak, United States District Judge.

OPINION

On December 16, 2008, Magistrate Judge M. Faith Angell filed a Report and Recommendation (Docket No. 230) that concluded that the court should grant the defendants' motions to dismiss plaintiff Mark Jackson's complaint (Docket Nos. 170, 171). Judge Angell recommended dismissal with prejudice as a sanction for, *inter alia*, Jackson's continuing failure to file a properly-pleaded complaint and his chronic obstinacy regarding the court's orders and decisions. Jackson has submitted his objections (Docket No. 234) and defendants have filed responses (Docket Nos. 235, 236). Jackson then, with leave of the court, has submitted a reply to the responses (Docket No. 242), and the defendants have, with leave, filed a sur-reply (Docket No. 243). As I will adopt the factual conclusions and virtually all the legal analysis of the Report and

Recommendation, I will forego an additional recitation of the facts.

I. Analysis

I agree with Judge Angell's careful and thorough assessment of the Consolidated Amended Complaint in this suit, and I find much in the CAC to warrant application of the sanction limned by *Poulis v State Farm Fire & Cas. Co.*, 747 F.2d 863 (3d Cir. 1984). Viewed in the light of the history of this litigation and the decisions of this court, the CAC seems a model of obstructive and contumacious posturing. I do not consider most of the efforts by Jackson's counsel to be appropriate advocacy within the rules; instead, I agree with Judge Angell that they represent recurring obduracy of the kind that warrants sanction under *Poulis*.

Even so, application of the full *Poulis* sanction to Jackson's consolidated lawsuit gives me pause. Judge Angell, in balancing the six *Poulis* factors, acknowledges that it is conceivable that "some of Plaintiff's claims may have merit." R & R at 17. Dismissal under *Poulis* is not an 'all or nothing' proposition for a civil lawsuit. So long as the district court conducts a proper balancing of the factors, the "extreme sanction" of *Poulis* can be flexibly applied to a variety of circumstances. *Anchorage Assoc. v. V.I. Bd. Of Tax Review*, 922 F.2d 168, 177 (3d Cir. 1990). A court can apply the dismissal sanction to individual claims or defenses. *Comdyne I, Inc. v. Corbin*, 908 F.2d 1142, 1148 (3d Cir. 1990). Further, it is prudent for a court considering a dismissal that would serve as a final adjudication to resolve doubts in favor of reaching a

decision on the merits. *Adams v. Trs. of New Jersey Brewery Employees Pension Trust Fund*, 29 F.3d 863, 870 (3d Cir. 1994). Accordingly, while I agree with Judge Angell's balancing of the *Poulis* factors as regards the CAC *in toto*, I have the discretion to levy the *Poulis* sanction against all or just some of Jackson's claims. In cautious exercise of that discretion, and in light of the conclusion (which Judge Angell and I share) that it is possible that certain of Jackson's claims may not be wholly meritless, I will dismiss most of the claims while allowing a small group to survive.

The RICO claims (Counts I - XI of the CAC) will be dismissed. The worst pleading abuses in these consolidated cases all arise from these claims. Counts XX -XXV of the CAC, which are state law claims, will also be dismissed because, as a group, they reflect clear disregard for the past directives of this court, and they are substantively interconnected with the RICO claims and undermined by the same kinds of pleading flaws.

The ERISA claims (Counts XII - XV of the CAC) are troublesome for a number of reasons. In the last round of motions to dismiss before these two cases were consolidated, some ERISA claims were dismissed and some survived from each of the two suits - but they appear conflated in the CAC. In addition, Counts XIII and XIV contravene, at least in part, this court's earlier orders. [1] Lastly, Jackson recites more than once that ERISA no longer applies to this lawsuit, [2] and yet he has pleaded claims under the Act. In light of this, I will dismiss all of plaintiff's ERISA claims.

The four claims against Rohm & Haas that sound in the ADA and PHRA (Counts XVI - XIX of the CAC)

survive dismissal. They appear to retain some assertable pertinence even after the excision of allegations and assertions that supported all the dismissed claims. Moreover, they do not evince the patent pleading deficiencies or the disregard for the past orders of this court that support *Poulis* dismissal of most of the CAC. The PHRA claims (Counts XVII and XIX) will be dismissed, however, as to the individual defendants named in the CAC because Jackson has not pleaded any factual scenario that raises such claims above a speculative level for these persons. "While a complaint ... does not need detailed factual allegations ... a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do ...." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007) (internal citations omitted).

In light of the fact that I will adopt, in greater part, Judge Angell's Report & Recommendation and dismiss twenty-one of the plaintiff's twenty-five claims with prejudice, Jackson once again will have to file a corrected complaint. He will be required to limit his efforts to (1) the four claims that have survived this round of motions to dismiss and (2) the relevant facts that, in good faith compliance with *Twombly*, 127 S. Ct. at 1964-65, are, so the pleader contends, supportive of those claims.

II. Conclusion

For the reasons stated above, I will adopt Magistrate

Judge Angell's Report and Recommendation in large part. An appropriate order follows.

ORDER

AND NOW, this 19th day of March, 2009, after review of the Report and Recommendation of Judge M. Faith Angell and the responses of the parties, it is hereby ORDERED that:

1. The December 16, 2008 Report and Recommendation of Magistrate Judge Angell (Docket No. 230) is APPROVED and ADOPTED IN PART.

2. Plaintiff's Objections (Docket No. 234) are OVERRULED.

3. The Rohm & Haas Defendants' Motion to Dismiss the Consolidated Amended Complaint (Docket No. 170) and the Liberty Life Defendants' Motion to Dismiss the Consolidated Amended Complaint (Docket No. 171) are GRANTED IN PART and DENIED IN PART:

a. Counts I - XV of the Consolidated Amended Complaint (CAC) (Docket No. 168) are DISMISSED WITH PREJUDICE;

b. Counts XVII and XIX of the CAC are DISMISSED as to defendants Raj Gupta, Robert Lonergan, and Ellen Friedell;

c. Counts XX - XXV of the CAC are DISMISSED WITH PREJUDICE.

4. Plaintiff will be permitted to file a second consolidated amended complaint that pleads any of the remaining claims from the CAC that he elects to pursue; this amended complaint is to be filed by April 6, 2009.

5. On or before April 27, 2009, defendants are to file responses to this second CAC.

6. Pursuant to the court's Memorandum/Order of Sept. 12, 2007 (Docket No. 125), 28 U.S.C. § 636(c), and the Opinion and Order of this court dated March 19, 2009 denying plaintiff's motion to vacate the reference, this case remains assigned to Magistrate Judge M. Faith Angell.

BY THE COURT:

/s/ Louis H. Pollak, J.
Pollak, J.

Footnotes

[1]In my Memorandum/Order of Sept. 12, 2007 (Docket No. 125 in 05-cv-4988) at 12-13, I made clear that these claims - brought under 29 U.S.C. §§ 1132(a)(3), 1105 -- could survive, but only because Jackson sought equitable relief under them. His demands for damages under the claims were dismissed. *Id.* In the CAC, Jackson again seeks monetary damages under these claims, in addition to all other available remedies. In his objections, Jackson states that he pleaded monetary damages "in the alternative." I am not persuaded that this cures the contravention of earlier orders.

[2]Two such recitals are as follows:

> ... the rights and remedies prescribed by ERISA, which ordinarily are exclusive in nature, are not applicable and/or not the exclusive rights and remedies available to plaintiff and others eligible for disability benefits.... Since at least 2002-present, both Rohm and Haas and Liberty Life have intentionally misrepresented to numerous employees, plan participants and others, that the Rohm and Haas Company's disability plan is a welfare plan within the meaning of ERISA when they know that the plan is not an ERISA-governed plan ...

CAC ¶ 236, 239.

> As set forth at length in the CAC, the 2003 Summary Plans Description ("SPD") states that the R&H disability plan is funded from the "general assets" of the corporation. *See CAC at* ¶236. Such a practice removes the disability plan from the coverage of the ERISA statute.

Pl.'s Obj. at 31.

Civil Action No. 05-4988

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK JACKSON, Plaintiff,

v.

ROHM & HAAS COMPANY, et al., Defendants.

December 16, 2008

REPORT AND RECOMMENDATION

M. FAITH ANGELL
United States Magistrate Judge

The dispute between the parties spans over ten years and has been the subject of numerous lawsuits in both federal and state court. As the parties, and Judge Pollak, are intimately familiar with the course of the litigation, I will not repeat it here, except as necessary to explain my analysis. Presently before me are the Rohm & Haas Defendants' and the Liberty Life Defendants' motions to dismiss Plaintiff's Consolidated Amended Complaint. The Defendants argue that the Consolidated Amended Complaint ["CAC"] is dominated by frivolous claims and theories, and that Plaintiff's continued refusal to comply with Court Orders and to file a proper complaint warrants dismissal of the CAC with prejudice. *Rohm & Haas Defendants' Motion to Dismiss the Consolidated Amended Complaint* [Docket Entry No. 170]1 at pp. 7, 25. *See Liberty Life Defendant's Motion to Dismiss*

Consolidated Amended Complaint [Docket Entry No. 171] at 2 ("[T]he [CAC] is an amalgam of all the others – incorporating virtually every scurrilous and incendiary allegation from pleadings past. Plaintiff's complaint should be dismissed in its entirety and with prejudice because it fails to offer a short and plain statement demonstrating Plaintiff's entitlement to relief. Plaintiff has disregarded the pleading mandates of the Federal Rules, despite warnings from the Court.")

I. The CAC Is Clearly An Improper Plea

I have reviewed the entire record in all three federal Jackson matters[3], and conclude that the Consolidated Amended Complaint filed in the above-captioned matter is clearly improper. 4 In no way does the CAC comply with Rule 8 of the Federal Rules of Civil Procedure, which requires "a short and plain statement" of the grounds for the court's jurisdiction and of the claims showing that the plaintiff is entitled to relief. *See Fed.R. Civ.Pro. 8(a);* In *Re: Westinghouse Securities* Litigation, 90 F.3d 696, 702 (3d Cir.1996)("Taken together, Rules 8(a) and 8(e)(1) underscore the emphasis placed on clarity and brevity by the federal pleading rules."). The CAC is one hundred and fifty-two pages long, presents twenty-five claims against fifty-one defendants (twenty-five of which are "John Does"), and includes ninety-three footnotes. It does not identify what each of the named Defendants is alleged to have done to warrant the multiple claims against them and, thus, lacks factual foundation. In addition, the counts are convoluted and are riddled with inflammatory and unwarranted conclusory allegations, and, therefore, is in violation of

my May 21, 2008 Order directing Plaintiff to limit the consolidated amended complaint to claims for which he has a good faith basis.

Plaintiff argues that Defendants are required to go through the CAC, "either a fact at a time, or a claim at a time," and show the Court where the complaint either goes against a current order or legal standard. *See N. T. 12/5/08* at p. 24. *See also Plaintiff's Response to the R&H Defendants' Motion to Dismiss* CAC [Docket Entry No. 173] at p. 2 (arguing that the basis for the R&H Defendants' motion to dismiss CAC is "unclear," where "Defendants have made no argument with respect to most of Plaintiff's claims, and instead devote much of their effort to the proposition that the Complaint should be dismissed as a sanction for failure to adhere to Court Rules and/or prior Court Orders."); and *Plaintiff's Response to Liberty Life Defendants' Motion to Dismiss* CAC [Docket Entry No. 175] at p. 31 (arguing that because the Liberty Life Defendants made no argument with respect to certain claims, the claims "are to be treated as uncontested"). I disagree. The CAC is manifestly improper and this is Plaintiff's *tenth* complaint in the federal actions (the first nine of which Defendants have responded to claim by claim).5 I see no reason to require Defendants to address each and every fact and claim.

Nor is the Court inclined to do so, given the facts and circumstances of this litigation. I will, however, identify some glaring examples of improper claims/allegations in support of my conclusion that the CAC is an improper pleading.

A. The CAC Includes Claims Related To The Warrick Notes That The Court Has Consistently Ruled Are Frivolous.

In *Jackson I*, Plaintiff first attempted to bring a claim under civil RICO based on allegations that the R&H Defendants and their counsel altered/manufactured the Warrick notes and offered perjured testimony related to these notes in a scheme to defraud the state court. *June 30, 2005 Opinion in Jackson I* [Docket Entry No. 52] at pp. 7-8. Judge Pollak, in a June 30, 2005 Opinion, granted Defendants' motion to dismiss, concluding that Plaintiff lacked standing under RICO because the alleged fraudulent conduct was entirely irrelevant to Plaintiff's alleged injury (loss of a jury verdict in state court). Id. at pp. 10-13.

Each time Plaintiff has attempted to resurrect the Warrick note allegations in *Jackson II* and III, Judge Pollak has rejected these claims as frivolous. *See, e.g., March 9, 2006 Opinion in Jackson II* [Docket Entry No.47] at pp.10-116; *July 7, 2006 Opinion in Jackson II* [Docket Entry No. 90] at pp. 2-37; and *September 5, 2007 Opinion in Jackson III* [Docket Entry No. 47] at p. 4.[8]

In a recent January 10, 2008 Opinion in Jackson II, Judge Pollak wrote:

> "This [Warrick notes] issue has been litigated multiple times, yet Plaintiff apparently still fails to understand that the authenticity of the notes was irrelevant to the disposition of Jackson I because that case was dismissed for lack of

> RICO standing, an issue that has nothing to do with whether the interview notes were or were not genuine. Therefore, as explained in this court's [March 9, 2006] sanctions order, Plaintiff's contention in this case that Defendants obtained a favorable result in Jackson I by relying on those interview notes is frivolous, as the notes had nothing to do with this Court's Jackson I decision. [...] That Defendants now claim that the notes are authentic - in the context of claims that make the authenticity of the notes relevant - does not constitute any inconsistency on Defendants' part."

January 10, 2008 Opinion in Jackson II [Docket Entry No. 152] at pp. 3-4.

In the CAC, Plaintiff reasserts and expands his allegations regarding the Warrick notes. As part of his RICO obstruction of justice claims, Plaintiff asserts that Defendants knowingly used manufactured/altered documents and perjured testimony, have withheld a "third version" of the Warrick notes "to develop the record that served as the basis for their defenses in the state and subsequent Federal cases, including Defendants' sweeping effort to establish preclusion as a bar to those cases," and have affirmatively misrepresented in their answers to the various Jackson complaints that the Warrick evidence is legitimate and authentic. CAC [Docket Entry No. 168] at pp. 97-98. As a result of the Defendants' "pattern of racketeering," Plaintiff alleges that he was "legally injured within the meaning of RICO," and his injuries include, inter alia,

"interference with the prosecution of Plaintiff's various claims." Id. at pp. 100, 101. By basing his RICO obstruction of justice claims on allegations related to the Warrick notes and interference with his state and federal cases, Plaintiff has "run afoul" of Judge Pollak's prior rulings."

Plaintiff argues that "all of the obstruction [of justice] counts are supported by facts subsequent to [Judge Pollak's May 9, 2006 opinion] [. . .] [a]nd then the prior facts then become part of the pattern." N. T 1215108 at pp. 25-26. In a September 5, 2007 Opinion in *Jackson III*, Judge Pollak rejected an attempt by Plaintiff to append predicate acts alleged in *Jackson I* and *Jackson II* to the alleged retaliation acts in *Jackson III* to meet the closed-end continuity requirement for a pattern of racketeering activity. *September 5, 2007 Opinion in Jackson III* [Docket Entry No. 48] at pp. 10-11. Judge Pollak held that "Plaintiff cannot bootstrap claims from his prior lawsuits to satisfy the continuity requirement in the present action." Id. at p. 11. Similarly, Plaintiff cannot bootstrap claims already adjudicated frivolous, namely that the Defendants' alleged conduct with respect to the Warrick notes have interfered with his prosecution of claims in the state court and in *Jackson I*, to new allegations in the CAC.

B. The CAC Fails to Identify What Each Defendant Is Alleged To Have Done To Warrant The Claims Against Them.

In the CAC, named Defendants include individuals and entities who/which were previously named in earlier iterations of Plaintiff's complaint and

then dropped, for example, Kelly G. Huller, Esq. Ms. Huller is identified in an introductory paragraph of the CAC[10], and never mentioned again in the body of the CAC, except in the "Wherefore" paragraph in all of the RICO and most of the state law counts.[11] At oral argument on the motions to dismiss, Plaintiff's counsel argued:

> "As far as Kelly Huller is concerned, I think I have heard enough on that as well, too. Kelly Huller is in this case because she is represented by HARKINS
>
> CUNNINGHAM. Everyone who is represented by HARKINS CUNNINGHAM is bound by their actions in this case, that has been thoroughly briefed."

N. T 1215108 at pp. 24-25.12 There is no good faith basis for reinstating Defendants based on Plaintiff's conclusory statement that all prior clients are bound by the allegations that Plaintiff is asserting against HARKINS CUNNINGHAM.

A similar argument is made with respect to the reinstatement of MORGAN LEWIS & BOCKIUS LLP as a named defendant. The R&H Defendants have challenged this as improper, arguing that MORGAN LEWIS' only alleged involvement was with respect to the Warrick notes in the original state court action back in 2001. *R&H Defendants' Motion to Dismiss* CAC at pp. 24-25. In his response to the motion to dismiss, Plaintiff explains:

> "Morgan Lewis and Conrad O'Brien are

> not defendants because of their conduct in the original state court case. Rather, the CAC is clear that the claims against the law firm are based upon the actions taken by Harkins Cunningham, their counsel in the state and federal cases: [...]
>
> At this late date, the defendant law firms remain unwilling to acknowledge the years-long pattern of misconduct that has permeated the state and federal courts, and to take the actions required of them. And, as defendants' motion shows, these same lawyers remain completely unrepentant."

Plaintiff's Response to the R&H Defendants' Motion to Dismiss CAC at pp. 33-34. Again, in the absence of any factual foundation, derivative claims against other law firms based on allegations against HARKINS CUNNINGHAM are improper.

C. The CAC Includes Claims That The Court Has Ruled Are Improper.

In Count XIII of the CAC, brought under ERISA, 29 U.S.C. §1 132(a)(3), Plaintiff seeks monetary damages. CAC at pp. 135, 139. In two prior opinions, Judge Pollak has advised Plaintiff that monetary damages are not available under this statutory provision and, therefore, his request is "out of bounds." *September 13, 2007 Opinion in Jackson II* [Docket Entry No. 125] at p. 12 and *September 5, 2007 Opinion in Jackson III* [Docket Entry No. 48] at pp. 26-28. D. The CAC Includes Claims Related To Alleged Events At Plaintiffs Residence That Are Without Foundation.

In the CAC, Plaintiff, as part of his RICO claims, charges all fifty-one named Defendants with harassment, intimidation, and retaliation occurring at his home. Specifically, Plaintiff alleges that unknown persons: placed flower petals "of an unknown origin similar to those found at a funeral or memorial" on his car on the night of September 23, 2006; on three occasions in 2006, neatly placed flower petals on Plaintiff's driveway at night[13]; banged loudly on Plaintiff's door on February 15, 2007 at approximately 3:00 a.m.; parked a van across the street from Plaintiff's residence on March 2, 2007; and drove a black SUV on March 7, 2007 which "nearly struck" Plaintiff as he was crossing the street in front of his residence, and then stopped, with the driver rolling down his window and stating to Plaintiff: "I'm sorry I almost hit you. You need to be more careful, especially in other situations when you're f* * *ing with the wrong people." As to all these events, Plaintiff alleges that he perceived them to be "a threat to his person, safety and/or property intended to harass, intimidate, oppress, retaliate and dissuade him from continuation the pending litigation (both the *Jackson III* case, as well as the *Jackson I* and II cases) against the R&H/Liberty Defendants and/or others," and believed the incidents to be connected to the litigation as they coincided with various litigation events identified by Plaintiff. CAC at pp. 34-37 Pars. 142, 144, 147, 149 and pp. 40-42 In 161, 163, 164.

Defendants argue that the allegations related to events occurring at Plaintiff's residence are "inherently incredible" and "totally lacking in foundation." *R&H Defendants'Motion to Dismiss* CAC at p. 15. *See Liberty Life Defendants' Motion to Dismiss* CAC at p. 17 ("Although Plaintiff alleges that he perceived these

incidents to be related to his long-running dispute with Defendants, he does not allege any facts from which the Court could infer that Liberty Life was responsible for these bizarre incidents.").

In response, Plaintiff asserts that the CAC "lays a substantial foundation with respect to the challenged conduct," and argues that "[c]redibility determinations are for the fact-finder and not [the] Court in ruling upon a dismissal motion." *Plaintiff's Response to the RAH Defendants' Motion to Dismiss* CAC at p. 34. According to Plaintiff, he is not required to identify the perpetrators. *Plaintiffs Response to Liberty Life Defendants' Motion to Dismiss* CAC at p. 12. He explains:

> "Whether the challenged conduct is 'logical,' or matches an expectation of how an individual might behave under certain circumstances, is not the standard. The question is whether the Complaint contains facts which, when evaluated under the appropriate standards, state claims upon which relief can be granted. Pursuant to the Orders of September 5 and 13, 2007, and April 21, 2008, that question already has been answered.
>
> Defendants do not argue that the allegations are insufficient to state a claim upon which relief can be granted. They cannot. Credibility determinations are for the fact-finder and not the Court in ruling upon a dismissal motion, and the CAC lays a substantial foundation with respect to the challenged conduct. [citation omitted]. While Defendants argue that Plaintiff's claims are not credible, it is

> Defendants who have established a pattern of lying to Plaintiff, various Courts, and others, no matter the legal or ethical requirements or consequences.
>
> [...]
>
> Under the circumstances, it does not strain credulity that Defendants are behind the events at Plaintiff's residence, or that they would lie about it. Again, the CAC lays a substantial foundation connecting the events to the litigation. At the pleadings stage, Plaintiff is not required to prove his case, but only to state a claim upon which relief can be granted."

Id. at pp. 13-15.

The legal standards cited by Plaintiff are correct. However, Plaintiff's characterization of the CAC as laying a "substantial foundation" to support this claim is not. Plaintiff may believe that all fifty-one named Defendants are connected to the alleged incidents "perpetrated" by unknown persons at his home, but he alleges no factual basis for this belief in the CAC. The allegations relative to alleged incidents at Plaintiff's residence are manifestly deficient for purposes of stating a RICO obstruction of justice claim[14]

II. Dismissal Of The CAC With Prejudice Is Warranted Under A Poulis Analysis

Defendants have requested that the CAC be dismissed with prejudice. *R&H Defendants' Motion to Dismiss* CAC at p. 32; *Liberty Life Defendants' Motion to Dismiss* CAC at p. 21. Defendants argue that the Court has authority to dismiss the CAC with prejudice

under its inherent power to manage cases before the Court, or in the alternative, under Rule 12(f) and/or Rule 8. *R&H Defendants' Motion to Dismiss* CAC at pp. 6-7, 25-26. *See also N. T. 12/4/08* at pp. 5-10 (R&H Defendants' Counsel argues: "There are many sources for authority for you to do what we think you should do, which is to dismiss this action with prejudice," and cites Rules 8, 41(b), 9(b), 12(b)(6) and 12(f), and the inherent authority of the Court to manage cases before it). The R&H Defendants suggest that the Poulis factors apply in this situation, and argue that each prong of the Poulis test weighs in favor of dismissal of the CAC with prejudice. *R&H Defendants' Motion to Dismiss* CAC at pp. 26-32.

At oral argument on the Defendants' motions to dismiss the CAC, Plaintiff's Counsel chose to rest on his submissions on the Poulis issue. N. T. 12/5/08 at p. 23.15 In his written response to Defendants' Poulis argument, Plaintiff did not address any of the six factors, instead, he wrote:

> "In what can only be considered a 'fantastic' argument, Defendants move for dismissal under *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984), where a lawyer was sanctioned for missing deadlines. Defendants argue that each of the six Poulis facts [sic] weighs in favor of dismissal.
>
> Plaintiff was directed to file the CAC pursuant to the Order of May 21, 2008 consolidating *Jackson II* and *Jackson III*. Defendants' Poulis argument is utter nonsense. [citations to the R&H Defendants' brief omitted]"

Plaintiff's Response to the R&H Defendants' Motion to Dismiss CAC at pp. 36-37.

As discussed above, I find that the CAC fails to comply with the basic pleading requirements of Rule 8 of the Federal Rules of Civil Procedure, and does not comply with prior orders of the Court in violation of Rule 41 (b) of the Federal Rules of Civil Procedure. Given the lengthy history of this litigation and the present procedural posture, and consistent with the Court's inherent power to manage cases before it, I will address whether dismissal of the CAC with prejudice is warranted under a Poulis analysis. *See Briscoe v.* Klaus, 538 F.3d 252, 258 (3d Cir. 2008)(because dismissal with prejudice is a drastic sanction, it is imperative that the District Court have a full understanding of the surrounding facts and circumstances pertinent to the Poulis factors before it undertakes its analysis). *See also Hernandez v. Palakovich,* No. 06-2060, 2008 WL 4299279 at *5 n.7 (3d Cir. September 19, 2008)(the District Court has inherent power to dismiss a case *sua sponte* for failure to follow its orders).[16]

The Poulis analysis requires the Court to balance six factors to determine whether dismissal of a case is warranted: (1) the extent of the *party's* personal *responsibility;* (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in *bad faith;* (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions;* and (6) the *meritoriousness* of the claim or defense. *Briscoe,* 538 F.3d at 258 (3d Cir. 2008). Not all of the factors need weigh against a

plaintiff to warrant dismissal. *Hernandez*, 2008 WL 4299279 at *4 (3d Cir. September 19, 2008).

In this case, I find that at least five of the six Poulis factors weigh in favor of dismissal of the CAC with prejudice. First, I find Mr. Jackson personally responsible for the content of the CAC. After this litigation was returned to me for pretrial management and to "discuss with the parties how best to move this case forward," I ordered the parties to be present at a May 20, 2008 hearing. *See April 22, 2008 Order in Jackson II* [Docket Entry No. 161]. In the April 22, 2008 Order, I stated: "Counsel [...] are reminded that in filing any motion or pleading, they are bound by Rule 11 of the Federal Rules of Civil Procedure." Id. at p. 2.

At the May 20, 2008 hearing, I explained that I had required the parties to be present "because I really do want to emphasize that this case has a history," and is a "fairly heavily litigated matter." N. T. 5/20/08 at p. 4. I expressed concern for the course of this litigation, and directed Plaintiff's Counsel to "prepare a complaint which encompasses all the claims he believes in good faith he can raise before the Court based on whatever actions he believes the respondents have exerted against his client." Id. at pp. 4-5. Plaintiff's Counsel was advised: (1) to be concise; (2) that I believed a consolidated amended complaint of over one hundred pages was unrealistic; (3) that he was bound by all rules of court; (4) that all prior rulings by Judge Pollak would be applied when reviewing the consolidated complaint; and (5) that the consolidated amended complaint was Plaintiff's final document; no more amendments would be permitted. Id. at pp. 8, 9,11.

The May 20, 2008 hearing was followed by a May 21, 2008 Order permitting Plaintiff to file a consolidated amended complaint "alleging all claims for which he has a good faith basis." *May 21, 2008 Order in Jackson II* [Docket Entry No. 163]. Plaintiff was advised that the consolidated amended complaint "must be concise and must comply with all federal and local rules," and that the Court would not permit later amendments to this pleading. Id.

Because Mr. Jackson was present at the May 20, 2008 hearing and heard my concerns about the way this action was being litigated, was instructed to file a proper consolidated amended complaint, and was warned that there would be no more amendments, I conclude that he is personally responsible for the content of the CAC.17

Second, there is no question that Plaintiff's failure to file a proper complaint during this drawn-out litigation has prejudiced the Defendants and impeded their ability to prepare a defense. The CAC is Plaintiff's tenth iteration of his claims in this forum. The Defendants have had to answer all ten complaints, in which the scope of the claims and the number of named Defendants and co-conspirators have multiplied, and the breadth of the conclusory, baseless allegations has expanded. Over five years after Plaintiff first filed in this forum, Defendants have yet to see a proper complaint which gives them fair notice of the claims against them.

Third, the history of dilatoriness in this litigation is clear. In several prior opinions, Judge Pollak has commented on Plaintiff's steadfast refusal to file a

proper complaint. For example: (1) in a March 9, 2006 Opinion in *Jackson II*, Judge Pollak determined that Plaintiff original complaint was "dominated by claims which are without warrant and frivolous" and that Plaintiff's pleading of all of his federal causes of action was "manifestly deficient;"[18] (2) in a July 7, 2006 Opinion in *Jackson II*, Judge Pollak determined that "the second amended complaint that [Plaintiff] proposes to file retains substantial elements from his original complaint that I have already determined, in the opinion filed on March 9, 2006, to be frivolous. [. . .] For Jackson to continue to assert, in his proposed second amended complaint, claims and theories that I have already found frivolous in an exercise in futility, and granting him leave to file his proposed second amended complaint would, therefore, be inappropriate;"[19] (3) in a September 5, 2007 Opinion in *Jackson III*, Judge Pollak ruled that "while several of Mr. Jackson's claims [in both the original complaint and the amended complaint] are tenuous at best, they fall just short of the threshold for Rule 11 sanctions;"[20] and (4) in a January 10, 2008 Opinion in *Jackson II*, Judge Pollak noted "Plaintiff's penchant [...] for making the same argument no matter how often this Court rejects it," and the need to deter Plaintiff's "abusive litigation practices."[21]

In addition, during several Court hearings at which Mr. Jackson was present, I have noted my concerns about the pleadings in this litigation. For example, at an August 6, 2008 hearing on Plaintiff's Motion to Disqualify Counsel for the R&H Defendants, I opined that Mr. Jackson's interests were getting lost the course of this litigation. I questioned whether the "multi-faceted complaints [and] the kind of motions that

have resulted," were benefitting Mr. Jackson "who is the integral person in this process." N. T 8/6/08 [Docket Entry No. 181] at pp. 29-30. The pattern of continued failure to file a proper complaint spans the life of this case and continues to this day.

Fourth, Plaintiff's consistent failure to file a proper complaint, despite repeated directives from the Court, can only be viewed as willful or in bad faith. As discussed below, Plaintiff's Counsel has already been sanctioned under Rule 11 in this case for filing a complaint dominated by frivolous claims. Since then, Plaintiff has been afforded numerous opportunities to file a proper complaint, yet he has persisted in raising the same frivolous claims and adding new baseless allegations with every new proposed complaint. This professionally irresponsible and inexcusable behavior cannot be tolerated.

Fifth, I conclude that there are no alternative sanctions to dismissal with prejudice which will be effective. On March 9, 2006 in *Jackson II*, Judge Pollak sanctioned Plaintiff's Counsel in excess of $80,000.00 for filing a complaint which contained frivolous claims. Since then, Plaintiff has repeatedly filed new iterations of his claims that resurrect claims previously ruled frivolous and adding ever expanding baseless allegations. The Court has no assurance that if permitted to amend his complaint yet again, Plaintiff will limit himself to claims for which he has a good faith basis.

The sixth Poulis factor, the meritoriousness of the plaintiff's claims, is the only factor that does not weigh heavily in favor of dismissal. While the CAC is

riddled with inflammatory and unwarranted conclusory allegations which lack factual foundation, some of Plaintiff's claims may have merit and/or have survived prior motions to dismiss. I find, therefore, that the sixth Poulis factor weighs against dismissal of the CAC with prejudice.[22]

After considering the six Poulis factors in light of Plaintiff's conduct, I am compelled to conclude that dismissal of this action with prejudice is appropriate and necessary.

In support of this conclusion, I echo Judge Pollak's comments in a March 9, 2006 Opinion in Jackson II

> "[I]n the course of this hard-fought litigation, [Plaintiff's:] Counsel's zeal [has] undermined his judgment; very regrettably, his zeal has taken him well beyond the bounds of negligence and into a realm of relative indifference to the legal setting in which he [is] crafting his pleadings. It should be added that, [...] this is not the first lawsuit between the parties - in fact, it is the third lawsuit by the same plaintiff against the same core defendants, and arising out of the same alleged harms (but with the cadres of accused defendants and the categories of alleged harms enhanced at each iteration of the charges) [. . .]"

March 9, 2006 Opinion in Jackson II at pp. 18-19. I would add, that since the March 9, 2006 Opinion, Plaintiff's Counsel's zeal has gone far beyond relative indifference and has risen to the level of a willful

disrespect for the Court and his opposing counsel. Under a Poulis analysis, in light of the circumstances of this litigation, I conclude that dismissal of the CAC with prejudice is warranted.

RECOMMENDATION

For the reasons set forth above, it is recommended that the R&H Defendants' Motion to Dismiss the Consolidated Amended Complaint [Docket Entry No. 170], and the Liberty Life Defendants' Motion to Dismiss the Consolidated Amended Complaint [Docket Entry No. 171] be GRANTED, and that the Consolidated Amended Complaint in the above-captioned matter be DISMISSED WITH PREJUDICE.

Footnote

[1]Hereinafter "R&H Defendants' Motion to Dismiss CAC."

[2]Hereinafter "Liberty Life Defendants' Motion to Dismiss CAC."

[3]*Jackson v. Rohm & Haas Company, et al. [Jackson I]*, CA No. 03-5299; *Jackson v. Rohm & Haas Company, et al. [Jackson III]*, CA No. 05-4988; and *Jackson v. Rohm & Haas Company, et al. [Jackson IIII]*, CA No. 06-3682.

[4]The Consolidated Amended Complaint was filed at Docket Entry No. 168, in Civil Action No. 05-4988 *[Jackson III]*.

[5]*See Plaintiff's Response to Liberty Life Defendants' Motion to Dismiss* CAC at p. 34 (noting that the Defendants did not made argument on each claim "as they had done in each of their past motions").

[6]In the March 9, 2006 Opinion, Judge Pollak granted

Defendants' motion for Rule 11 sanctions. He determined that the original complaint in *Jackson II* violated Rule 11(b)(2) because it included frivolous claims that the R&H Defendants perpetrated a fraud on the court by offering falsified evidence [the Warrick notes] in support of its defense of *Jackson I*

[7]In the July 7, 2006 Opinion, Judge Pollak denied Plaintiff's motion for leave to file a second amended complaint without prejudice. Judge Pollak ruled that Plaintiff could file a second amended complaint to present claims based on his alleged termination by R&H. However, the proposed second amended complaint continued to assert elements from the original complaint [claims of obstruction of justice by submitting allegedly false evidence from the state court action] that Judge Pollak had already concluded were frivolous.

[8]The original complaint in *Jackson III* included factual allegations that "[t]he *Jackson I* defendants knew or should have known that the [Warrick] documents were fraudulent and that the testimony with respect to the documents had been perjured." *September 5, 2007 Opinion in Jackson III* at p. 4 (quoting Plaintiff's Original Complaint). Judge Pollak noted that these allegations "c[a]me close" to raising issues he had previously adjudicated frivolous and advised Plaintiff that "had [he] attempted to base a cause of action on purported facts such as that, he would have run afoul of [the] July 7, 2006 Order as well as Rule 11 ." Id.

[9]*See also CAC* at p. 24 Par. 104, which states "The actions of the R&H Defendants and Liberty Life were on behalf of themselves, as well as the *Jackson I* Defendants, who stood to gain a substantial benefit in the event that any of the actions described herein resulted in an advantage to them in the *Jackson I*

litigation."

[10]*See CAC* at p. 5 Par. 27.

[11]*See CAC* at 102 103, 104, 105, 106, 107, 108, 115, 117, 131, 132, 148, 150, 151, and 152.

[12]In his written response to the R&H Defendants's motion to dismiss, Plaintiff argues that "it must be remembered that the acts and omissions of Harkins Cunningham were on behalf of all of its clients," "including Ms. Huller." *Plaintiff's Response to the R&H Defendants' Motion to* Dismiss CAC at pp. 17 n.19, 34 n. 28.

[13]The dates on which Plaintiff alleges he woke up to discover flower petals on his driveway are October 19, 2006, October 31, 2006, and November 14, 2006.

[14]As the allegations related to incidents at his residence first appeared in the CAC, I reject Plaintiff's argument that Judge Pollak's prior orders of September 5, 2007 in *Jackson III* and on September 13, 2007 in *Jackson II* "answered the question" as to whether these allegations state a claim.

The April 22, 2008 Order of Judge Pollak dismissed "all outstanding motions without prejudice," and directed me to participate in moving the cases forward. April 22, 2008 *Opinion in Jackson II* [Docket Entry No. 160]. The Order contained no analysis and in no way can be read, as Plaintiff has argued, as a determination by Judge Pollak that Plaintiff's proposed third amended complaint in *Jackson II* stated claims upon which relief can be granted. *See Plaintiff's Response to the R&H Defendants' Motion to* Dismiss CAC at pp. 10-11 ("In denying (in the Opinion of April 21, 2008) Plaintiff's motion for leave to amend without prejudice, the district court determined that the *Jackson III* proposed Third Amended Complaint was not futile, and stated claims upon which relief can be

granted.").

[15]At the beginning of the argument, I asked Counsel for the Defendants to tell me under what authority or statute they were asking the Court to apply the Poulis standard. N. T. 12/05/08 at pp. 3-4. As discussed in the text above, Counsel for the R&H Defendants cited various specific rules and the inherent authority of the Court to manage cases. When asked if he wished to comment on the Poulis issue, Plaintiff's Counsel replied: "I think we will just rest on our submissions other than to say your first question today to Mr. Reed [Counsel for the R&H Defendants] pertained to Poulis, that was not answered by Mr. Reed. Poulis has six elements. I don't remember him answering your inquiry about it." Id. at pp. 22-23. As noted above, the R&H Defendants has briefed each of the six Poulis factors and argue that all weigh in favor of dismissal with prejudice.

[16]The Third Circuit has held that a court should look first to rule-based or statute-based powers before turning to its inherent sanctioning power. *Klein v. Stahl GMBH, et al., 185* F.3d 98,110 (3d Cir.1999).

[17]And, presumably, Mr. Jackson was apprised by counsel of the May 21, 2008 Order.

[18]*March 9, 2006 Opinion in Jackson* II [Docket Entry No. 47] at pp.10,12,13 n.6,17.

[19]*July 7, 2006 Opinion in Jackson* II [Docket Entry No. 90] at pp. 2, 3.

[20]*September 5, 2007 Opinion in Jackson* III [Docket Entry No. 47] at p. 4.

[21]*January 10, 2008 Opinion in Jackson* II [Docket Entry No. 152] at pp. 4-5 n.1.

[22]The potential meritoriousness of a plaintiff's claim alone cannot overcome the weight of the five other factors. *See Briscoe*, 538 F. 3d at 263 (3d Cir. 2008)(no single Poulis factor is dispositive).

Civil Action No. 05-4988

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK JACKSON, Plaintiff,

v.

ROHM & HAAS COMPANY, et al., Defendants.

November 17, 2008

REPORT AND RECOMMENDATION

M. FAITH ANGELL
United States Magistrate Judge

On September 15, 2008, Plaintiff filed a "Motion For Preliminary Injunction To Enjoin The Merger Between Rohm And Haas Company And The Dow Chemical Company And The Acquisition Of Safeco Insurance Company By The Liberty Mutual Group And To Require Full And Proper Disclosures." *See Docket Entry No.* 184.[1] The motion has been referred to me for Report and Recommendation by the Honorable Louis H. Pollak. Responses to Plaintiff's motion have been filed, and the matter is ready for disposition. For the reasons which follow, it is recommended that Plaintiff's motion for preliminary injunction be denied.

In his motion, Plaintiff identifies the transactions at issue as follows:

> (1) On July 10, 2008, Rohm and Haas Company ("R&H") and the Dow Chemical Company ("Dow") announced that Dow would acquire all outstanding shares of R&H for $78.00 per share, or $18.8 Billion, including $3.5 Billion in outstanding debt.

and

> (2) On April 23, 2008, Liberty Mutual Group ("LMG") and Safeco Corporation ("Safeco") announced that LMG would acquire all outstanding shares of Safeco for $68.25 per share, or $6.2 Billion.

Plaintiff's Preliminary Injunction Motion at p. 2.

Plaintiff argues that these transactions "are directly contrary to RICO and the Sarbanes-Oxley Act of 2002, and otherwise meet the requirements for a statutory injunction." Id.

According to Plaintiff:

> At closing, Dow will acquire all outstanding shares of R&H stock and R&H will cease to exist as a public ally-traded company. Consequently, the government may be foreclosed from certain enforcement actions necessary to vindicate the public interest, including direct action against Rohm and Haas Company stock. [. . .] R&H Officials are seeking to avoid the civil and/or criminal consequences of their conduct by selling the Company and eliminating the stock, effectively placing the stock beyond the reach of government officials.
>
> With respect to the LMG/Safeco

> transaction, while the proxy materials contain information concerning the liabilities (including litigation matters) of LMG subsidiaries, the Jackson cases have been omitted. Therefore, LMG and Safeco have concealed from Safeco shareholders, regulators, and other interested parties that an LMG subsidiary is a party to a series of fraud and racketeering cases, the substance of the cases (including, *inter alia*, that they pertain to Liberty's administration of a disability benefits plan), and that it has been determined by the district court that Plaintiff has stated claims for fraud, racketeering, and racketeering conspiracy. Therefore, the proxy statement (which LMG participated in preparing) violates the statute.

Id. at p. 61.

Plaintiff asserts that he is seeking a "statutory injunction" under civil RICO, specifically 18 U.S.C. § 1964(a). Id. at pp. 39, 77. *See* also N.T.10/30/08 at pp.14,16-17. Plaintiff distinguishes "a private attorney general's action under 1964(a)" from "the traditional standard for preliminary injunctions," and argues that in statutory injunction actions, "the movant must establish one, a violation of the statute sued upon and, two, a reasonable likelihood of future violations of the statute in the absence of injunctive relief." N. T. 10130108 at pp.16-17;19. *See* also Reply Brief to the Liberty Life Defendants' Response to Plaintiff's Motion for Preliminary Injunction [Docket Entry No. 206] at p. 4 ("Plaintiff's Motion has been brought pursuant to RICO's 'private attorneys general' standard, and seeks restraint of future violations of the Act pursuant to 18

U.S.C. §1964(a).").[2] Plaintiff asserts that "irreparable harm" or injury to Plaintiff is not the relevant inquiry. *Plaintiff's Reply Brief to Liberty Life Defendants* at p. 10. *See also* Plaintiff's Reply Brief to the Rohm and Haas Defendants' Response to Plaintiff's Motion for Preliminary Injunction [Docket Entry No. 205] at p.15 (characterizing Defendants' argument that the motion for preliminary injunction must be denied because Plaintiff has not shown that he will be irreparably harmed as "misplaced," and asserting that irreparable harm must be presumed in a statutory enforcement action).[3]

Plaintiff acknowledges that there is a Circuit split on the question of whether a private plaintiff may seek equitable relief under RICO, and that neither the Third Circuit, nor the United States Supreme Court, has decided the question. *Plaintiff's Preliminary Injunction Motion* at p. 40 n.46. He argues that equitable relief under RICO for private plaintiff's is consistent with the "private attorneys general" standard, the language of § 1964(a) concerning the prevention and restraint of future violations of the Act, and the remedial purposes of the statute. *Plaintiff's Reply Brief to Rohm & Haas Defendants* at p. 4. *See also* Plaintiff's Preliminary Injunction Motion at pp. 41-43.

It is well established that injunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *Winter v. Natural Resources Defense Council, Inc.*, ___ S.Ct. ___ , 2008 WL 4862464 at *10 (November 12, 2008). A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits,

that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his/her favor, and that an injunction is in the public interest. These factors are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent. Id. at * 9,16.

Plaintiff acknowledges that he has not suffered any harm related to the challenged transactions. N. T.10/30/08 at pp. 26-27 (asserting that Plaintiff does not meet the requirement of immediate or irreparable harm). *See also Plaintiffs Reply Brief to Liberty Life Defendants* at p. 10 ("[t]he [preliminary injunction] motion has not been brought to prevent a harm to Plaintiff but pursuant to 18 U.S.C. § 1964(a) and RICO's 'private attorney general' standard to prevent and restrain future violations of the Act and to protect the public interest."). There is, therefore, no basis to grant Plaintiff's request for preliminary relief to enjoin the Rohm and Haas/Dow Chemical and LMG/Safeco transactions.

Plaintiff attempts to avoid the "traditional standard for preliminary injunctions" by invoking his status as a "private attorney general" under the civil RICO statute. At oral argument before Judge Pollak, Plaintiff's Counsel explained:

> COURT: Well, I am suggesting that your prose [in the motion for a preliminary injunction] makes it clear that the persons who are "direct victims of the instant fraud," are shareholders of Rohm & Haas.
>
> PLAINTIFF'S COUNSEL: Among others

Harm to the plaintiff is not what this motion is about. Restraining future violations of the act pursuant to the private attorney general's standard is what this motion is about. We don't meet immediate or irreparable harm, and if that

COURT: You don't need it?

COUNSEL: We don't meet it, meet, M-E-E-T. We don't meet it, and if this motion is to be decided on whether or not the plaintiff is harmed or is immediately irreparably harmed, then this motion fails.

The motion is brought pursuant to the private attorney general's standard under 1964(a) of the Act, in order to prevent and restrain future violations of the Act.

COURT: You have told me that before, and it's not clear to me that merely characterizing this as a case in which you place yourself in the role of private attorney general exempts you from the familiar rules, for example, of proving irreparable injury.

Now, you just told me that if I think that is called for, your motion fails. COUNSEL: It would fail in this Court and maybe it fails altogether, but it fails in this Court.

N. T 10/30/08 at pp. 26 27.

Several hurdles stand in the way of Plaintiff's

theory as to the proper standard for a private attorney general seeking relief under the civil RICO provisions. First, as Plaintiff acknowledges, neither the Third Circuit, nor the United States Supreme Court, has decided the issue of whether a private plaintiff in a civil RICO action is entitled to injunctive relief under § 1964. *See Scheidler v. National Organization For Women*, 537 U.S. 393, 397 (2003)(reversing a district court injunction based on a finding that there was no underlying RICO violation and declining to address whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964(c)); *Steamfitters Local Union No. 420 Welfare Fund v Philip Morris*, 171 F.3d 912, 935 n. 20 (3d Cir. 1999)(noting that the Third Circuit had yet to decide whether injunctive relief is available to a private party under civil RICO and declining to reach the issue in the case before the court), *cert. denied*, 528 U.S. 1105 (2000). The propriety of private party injunctive relief under the civil RICO statute is an open question and one on which courts have differing views. *Compare Chambers Development Company v. Browning-Ferris Industries*, 590 F.Supp. 1528, 1540 (W.D. Pa. 1984) (recognizing the split in courts as to whether or not a district court's equitable powers extend to private plaintiffs in RICO cases and holding that equitable relief is available to private parties in RICO cases) *with Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1081, 1088 (9th Cir.1986)(noting the "disunity of views" among district courts and holding that Congress did not intend to give private RICO plaintiffs any right to injunctive relief), *cert. denied*, 479 U.S. 1103 (1987) and *Amari Company v. Burgess*, No. 07 C 1425, 2008 WL 268698 at *3 (N.D. Ill. January 28, 2008)(only the Attorney General may seek preliminary injunctive

relief).

Second, assuming *arguendo* that private parties may seek injunctive relief under the civil RICO statute, there is no authority for Plaintiffs argument that there is a different standard for "private attorneys general" under 1964(a) which makes irreparable harm irrelevant.

§ 1964(a) confers jurisdiction on the district court to entertain suits "to prevent and restrain violations of section 1962" and gives examples of remedial orders available to accomplish this. It does not expressly grant a cause of action for injunctive or equitable relief to any party.[4]

§ 1964(b) provides that "[t]he Attorney General may institute proceedings under this section" on behalf of the United States, and grants the government a cause of action for equitable relief. [5]

§ 1964(c) provides a private cause of action for recovery of treble damages to "any person injured in his business or property by reason of a violation of section 1962 of this chapter." *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 453 (2006).[6]

The standard for statutory injunction advanced by Plaintiff - namely that the movant must establish a violation of the statute sued upon and a reasonable likelihood of future violations of the statute in the absence of injunctive relief - has been applied when the government is seeking preliminary injunctive relief under § 1964(b). *See United States v. Local 30, United Slate, Tile and Composition Roofers, et al.*, 686 F.Supp. 1139, 1164 (E.D. Pa. 1988)(granting preliminary

injunctive relief where the government had established that were serious violations of the RICO statute and that there is a likelihood that the violations would continue without injunctive relief.).[7] However, that section is expressly limited to proceedings by the Attorney General.[8]

In the absence of a legislative mandate to the contrary, I see no basis to fashion a reduced standard for private attorneys general seeking equitable relief under the civil RICO statute, and decline to depart from the consistently applied traditional preliminary injunction standard. As Plaintiff acknowledges that he has not suffered any harm related to the challenged Rohm and Haas/Dow Chemical and Liberty Mutual Group/Safeco transactions, he cannot meet the irreparable injury prerequisite to the issuance of a preliminary injunction. It is, therefore, my recommendation that Plaintiffs motion for preliminary injunction be denied.

RECOMMENDATION

For the reasons set forth above, it is recommended that Plaintiff's Motion For Preliminary Injunction To Enjoin The Merger Between Rohm and Haas Company And The Dow Chemical Company And The Acquisition Of Safeco Insurance Company By The Liberty Mutual Group And To Require Full And Proper Disclosures [Docket Entry No. 184] be DENIED.

Footnotes

[1]Hereinafter "Plaintiff's Preliminary Injunction

Motion."

[2]Hereinafter "Plaintiff's Reply Brief to Liberty Life Defendants."

[3]Hereinafter Plaintiff's Reply Brief to Rohm & Haas Defendants."

[4]§ 1964(a) provides: "The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons."

[5]§ 1964(b) states: "The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper."

[6]§ 1964(c) provides: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not

apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final."

[7]The Court explained: "Preliminary injunctive relief may be granted if the United States established by a preponderance of the evidence that (1) there are serious violations of a statute affecting the public interest; and (2) there is a likelihood that the violations will continue absent injunctive relief. The United States' burden of proof is limited because of the legislative history of the RICO statute. In enacting § 1964, Congress legislated in the public interest to remove the criminal influence from legitimate business. In this action the United States represents the public interest defined in the RICO statute. Where the United States demonstrates a violation of a statute that embodies public policy interests, and some likelihood that the violations will continue, the court should grant preliminary relief without further inquiry." Id.

[8]Other courts have applied traditional preliminary injunction requirements in cases where the government seeks injunctive relief under § 1964(b). *See United States v. Local 560 (I.B.T), et al.*, 694 F.Supp. 1158,1191(D.N.J.)(granting the government's request for a preliminary injunction where the government established the four traditional equitable factors), *aff'd*, 865 F.2d 252 (3d Cir.1988).

[9]The cases cited by Plaintiff in support of his argument that he need only show that probable cause exists to believe that the statute in question is being violated and that there is some reasonable likelihood of future violations are cases where the government is seeking to enforce a statute. None involve a private party seeking to assert a statutory enforcement action. *See In re*

National Credit Management Group, LLC, et al., 21 F.Supp.2d 424 (3d Cir. 1998) (preliminary injunction granted in action brought by the Federal Trade Commission and the New Jersey Attorney General alleging violations of various non-RICO federal statutes and the New Jersey Consumer Fraud Act); *United States v. Focht*, 882 F.2d 55 (3d Cir. 1989)(the United States Consumer Products Safety Commission sought a preliminary injunction for alleged violations of the Federal Hazardous Substances Act); *United States v. Toys "R" Us, et al.*, 754 F.Supp. 1050 (D. N.J. 1991)(statutory injunctive relief sought by the United States for alleged violations of the Federal Hazardous Substances Act and the Consumer Products Safety Act); and *United States v. Richlyn Laboratories, Inc., et al.*, 827 F.Supp. 1145 (E.D. Pa. 1992)(United States' request for preliminary injunction granted; Defendants enjoined from continuing their manufacturing, processing and distribution activities until they are in compliance with applicable federal laws and regulations).

Filed 9/13/2007
Civil Action No. 05-4988
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK JACKSON, Plaintiff,

v.

ROHM & HAAS COMPANY, et al., Defendants

MEMORANDUM / ORDER

Presently before this court are two motions to dismiss plaintiff Mark Jackson's corrected second amended complaint, one filed on behalf of the Rohm & Haas Co. defendants ("Rohm & Haas") (Docket No. 106)[1] and the other filed on behalf of the Liberty Life Assurance Co. defendants ("Liberty Life") (Docket No. 110).[2] For the reasons explained below, I will grant the motions in part and deny them in part.

I. Facts

The history of this litigation is long and complex, so I will set out only those facts relevant to this decision. As I noted in my March 9, 2006, opinion in this case:

It all began when plaintiff Mark Jackson went on a date with a co-worker, and she subsequently accused him of sexually assaulting her. This accusation led defendant Rohm & Haas, Jackson's employer, to question Jackson about the date and to conduct an investigation into the allegation. Rohm & Haas was ultimately unable to substantiate the allegation, and it

took no action against Jackson. Nevertheless, Jackson found his interrogation by Rohm & Haas personnel so abrasive that he sued Rohm & Haas in a Pennsylvania state court for invasion of privacy and intentional infliction of emotional distress. During discovery in the state-court case, a dispute arose as to the authenticity of a document containing some notes taken by a Rohm & Haas employee during investigation of the assault allegation. Jackson accused Rohm & Haas and its lawyers of falsifying evidence. The state court eventually disposed of the lawsuit in favor of Rohm & Haas on the ground that, whether or not Jackson's common law tort claims against Rohm & Haas had factual merit, those claims were preempted by the state workers' compensation statute. *See Jackson v. Rohm & Haas* Co., 56 Pa. D. & C. 4th 449 (Phila. Co. 2002). This ruling was sustained on appeal. *See Jackson v. McCrory*, 833 A.2d 1155 (Pa. Super. Ct. 2003); *Jackson v. McCrory*, 849 A.2d 1205 (Pa. 2004).

Jackson then brought a federal action against Rohm & Haas, several of its employees, and the lawyers who represented it in state court, realleging falsification of evidence during the state court proceedings and contending that this amounted to, *inter alia*, a violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq. That suit will be referred to as *Jackson* I. This court dismissed the complaint in *Jackson* I by order dated June 30, 2005. *See Jackson v. Rohm & Haas Co.*, 2005 WL 1592910 (E.D. Pa. June 30, 2005) [, *aff'd* 2007 WL 579662 (3d Cir. Feb. 26, 2007)]. I concluded that Jackson lacked standing to bring a RICO claim because his injury (loss of the state-court case) was not proximately caused by defendants'

alleged fraud - that is, since the state-court ruling was based on statutory preemption rather than a finding on the merits of Jackson's privacy and infliction-of-emotional-distress claims, Jackson would have lost whether or not defendants had falsified evidence that went to the merits of the tort claims. Id. at 4-5. Because RICO was the only basis for federal jurisdiction, I dismissed the entire complaint, declining to exercise supplemental jurisdiction over the remaining state-law claims. Id. at 5.

On September 19, 2005 . . . Jackson filed another lawsuit in this court-[Jackson II]-claiming that the Jackson I defendants (Rohm & Haas, Rohm & Haas employees, and their state-court lawyers), plus the lawyers who represented the *Jackson* I defendants, plus Rohm & Haas's disability insurance administrator, Liberty Life, engaged in improper conduct in connection with Jackson I.

Opinion of March 9, 2006, *Jackson* II, No. OS-4988, 2006 WL 680933, at * 1 (E.D. Pa. March 9, 2006). After I granted sanctions, Jackson moved this court for leave to amend his complaint (Docket No. 71). I denied this request in a Memorandum/Order of July 7, 2006 (Docket No. 90) because it contained claims that I had previously deemed frivolous in my March 8, 2006, Opinion. On November 1, 2006, plaintiff again sought leave to amend his complaint (Docket No. 96). The defendants did not object to the amended complaint, and I granted leave to amend on December 19, 2006, and the second amended complaint was deemed filed as of that date (Docket No. 100). Plaintiff had inadvertently omitted a few paragraphs from the amended complaint, so the parties stipulated to the

filing of a corrected second amended complaint (Docket No. 104-OS) on January 30, 2007.

In his corrected second amended complaint (hereinafter "complaint"), Jackson asserts that the defendants violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* (Counts I and II) and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* (Counts III-VI). Jackson further alleges supplemental state law claims of fraud (Count VII), negligent misrepresentation (Count VIII), intentional infliction of emotional distress (Count IX), and civil conspiracy (Count X). Defendants' motions to dismiss followed, and they are now ripe for disposition.

II. Analysis

When reviewing a motion to dismiss under Rule 12(b)(6), a court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002). The court, however, "need not credit a complaint's `bald assertions' or `legal conclusions.'" Cal. *Pub. Employee Ret. Sys. v. Chubb Corp.*, 394 F.3d 126,143 (3d Cir. 2004) (citing *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997)).

The motion will not be granted unless the court is satisfied "that no relief could be granted under any set of facts that could be proved consistent with the

allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). The issue is not whether the plaintiff will ultimately prevail but only whether he should be entitled to offer evidence to support his claim. *See Neitzke v.* Williams, 490 U.S. 319 (1989). However, the complaint's "factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v.* Twombly, 127 S. Ct. 1955, 1965 (2007).

A. Counts I & II -- RICO

Counts I and II of Jackson's complaint allege that the defendants' conduct concerning the administration of his disability benefits violated RICO, 18 U.S.C. § 1961, *et seq.* Count I asserts a cause of action under § 1962(c), which directs that:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). Count II asserts a cause of action under § 1962(d), which directs that "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

"In order to plead a violation of RICO, plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Lum v. Bank of America*, 361 F.3d 217, 223 (3d Cir. 2004); *see also Sedima, S.P.R.L. v.* Imrex Co., 473 U.S. 479, 496

(1985). There must be at least two predicate acts of racketeering to constitute a "pattern of racketeering activity." *See* 18 U.S.C. § 1961(5).

The defendants argue that Jackson's allegations have three defects :[3] (1) they fail to allege the existence of an "enterprise" distinct from the defendants, (2) they fail properly to allege the predicate acts of mail and wire fraud, (3) they fail to allege an injury to business or property proximately caused by the defendants' alleged racketeering. I address each in turn.

1. Whether Jackson has alleged a distinct RICO "enterprise" The defendants argue that Jackson has not alleged the second element of a civil RICO claim, the existence of an "enterprise" distinct from the defendants themselves. In my recent Memorandum/Order in *Jackson v. Rohm & Haas Co. (Jackson III), No. 2:06* cv-03682-LP (E.D. Pa. Sept. 6, 2007), Mem./Order, at 9-10,[4] I ruled that Jackson satisfied the "enterprise" requirement by alleging that Rohm & Haas and Liberty Life each acted through a joint enterprise to do him harm. Jackson makes the same allegation in this case, and, for the same reasons, I conclude that Jackson has adequately pleaded an enterprise distinct from defendants Rohm & Haas and Liberty Life.

Defendants Lori Hamlin and Nancy Mayo, however, argue that they were merely agents of Liberty Life at all times relevant to this suit and thus are not proper defendants. The Supreme Court has held that a person is only a proper RICO defendant if she had "some part in directing the [racketeering] enterprise's affairs." *Reves v. Ernst & Young*, 507 U.S.

170, 179 (1993) (emphasis omitted). But Jackson has alleged as much. The Third Circuit has held that, under *Reves*, "*RICO* liability may extend to those who do not hold a managerial position within an enterprise, but who do nonetheless knowingly further the illegal aims of the enterprise by carrying out the directives of those in control." *United States v. Parise*, 159 F.3d 790, 796 (3d Cir. 1998). Here, Jackson has alleged that Hamlin and Mayo furthered the aims of the enterprise by misrepresenting to him his obligations under his disability benefits plan, improperly threatening him with forfeiture, and improperly suspending his benefits. *See, e.g., Am. Compl. Par. 47.* *Because* these alleged acts assertedly furthered the enterprise's alleged goals of harassing Jackson, interfering with his ability to prosecute Jackson I, forcing him to incur unnecessary costs, and depriving him of benefits, he has sufficiently alleged that they satisfy *Reves's* "operation or management test." *See Reves*, 507 U.S. at 179.

2. Whether Jackson has properly alleged the predicate acts of mail and wire fraud

The fourth element of a RICO violation, "racketeering activity," is defined as "any act which is indictable under" various criminal statutes, including 18 U.S.C. §§ 1341 and 1343, which relate to mail and wire fraud, respectively. 18 U.S.C. § 1961(1). The elements of these offenses are (1) the existence of a scheme to defraud, (2) the use of the mails (or, in the case of wire fraud, the wires) in furtherance of the scheme, and (3) the defendant's culpable participation in the scheme[6] *United States v. Dobson*, 419 F.3d 231, 236-37 (3d Cir. 2005) (elements of mail fraud); *United States v. Hedaithy*, 392 F.3d 580, 590 (3d Cir. 2004) (elements of

wire fraud). Under Federal Rule of Civil Procedure 9(b), the circumstances constituting mail or wire fraud "shall be stated with particularity." Fed. R. Civ. P. 9(b); *see also Lum*, 361 F.3d at 224-25.

"'The `scheme to defraud' element of the offense of mail fraud ... is not defined according to any technical standards. The scheme need not be fraudulent on its face, but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1976) (citations omitted). Here, the defendants argue that Jackson has not specified how they attempted to deceive him or anyone else. I disagree. Jackson alleges that, under the pretense of properly evaluating his claim for disability benefits, the defendants carried out a bad-faith program of harassing him, threatening him, and suspending his benefits. *See Am. Compl. Pars. 47-48. The* alleged purpose of the scheme was to do Jackson harm by forcing him to incur unnecessary costs, by causing him emotional distress, and by depriving him (at least for a time) of his bargained-for disability benefits. Id. The defendants allegedly executed this scheme through a series of communications that purported to be part of a good-faith claims evaluation process (thus eliciting Jackson's compliance), but were fraudulent inasmuch as the defendants had no intention of evaluating Jackson's claim fairly. Id. These allegations, which include references to a variety of telephone and mail communications with the defendants, explain in sufficient detail the circumstances of the alleged fraud, and they implicate the requisite level of deception.

The defendants further argue that, even if Jackson pleaded a fraudulent scheme, he did not allege that he relied on it. Whether reliance is a necessary element of mail and wire fraud for civil RICO purposes is unclear, as there is a circuit split on the issue, and the Third Circuit has yet to take a position. *Compare Sikes v. Teleline, Inc., 281* F.3d 1350, 1359-60 (11th Cir.2002) (requiring reliance), *and County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir.1990) (same), *with Sys. Mgmt., Inc v. Loiselle*, 303 F.3d 100, 103-04 (1st Cir. 2002) (reliance not required).

At this stage in the litigation, the question matters little because Jackson has alleged that he relied on the defendants' alleged misrepresentations. Am. Compl. Par. 49. Moreover, he has alleged that he completed at least some of the defendants' requests for information, *see, e.g.*, Am. Compl. Par. 47(d), which would, so it is charged, constitute reliance on the defendants' representations. Because reliance is duly pleaded, I will, for now, reserve the question of whether it is necessary.

3. Whether Jackson alleges an injury to business or property proximately caused by the alleged pattern of racketeering activity

The defendants argue that Jackson has not alleged an injury to business or property, as a plaintiff must to bring a civil RICO action. Jackson has alleged three injuries: (1) interference with his ability to prosecute the *Jackson* I litigation, (2) loss of benefits during the period of suspension, and (3) costs associated with complying with the defendants' requests for

information in order to reinstate his benefits. The lost benefits and costs of compliance are "concrete financial losses," which, under controlling Third Circuit precedent, are *per se* injuries to business or property. *See Maio v. Aetna, Inc.*, 221 F.3d 472, 483 (3d Cir. 2000). Thus, Jackson has properly alleged RICO injuries.[6]

The defendants also argue that Jackson has not specified in what way the alleged fraudulent scheme to harass, threaten, and deprive him of disability benefits constituted the proximate cause of his injuries. I believe that he has. In particular, Jackson has alleged that by sending him unwarranted requests for information and threats of forfeiture, the defendants succeeded in using the scheme to force him to incur a variety of unnecessary costs and to deprive him of his bargained-for disability benefits for a period of time.

In sum, the defendants have not pointed the court to any fatal defects in Counts I or II. Therefore, I will deny their motions to dismiss those counts.

B. Counts III-VI - ERISA

1. Counts III & IV - Breach of Fiduciary Duty

Jackson alleges that Rohm & Hass and Liberty Life, as administrators of his ERISA-governed disability benefits plan,[7] owed him fiduciary duties to manage the plan for his benefit. He further alleges that both breached these duties by harassing him, threatening forfeiture, and temporarily suspending his benefits without cause. Am. Compl. Par. 57. Unfortunately, the complaint does not specify under

which provision of ERISA he is suing. The two that fit a breach of fiduciary duty claim are § 1132(a)(2) and 1132(a)(3).[3] I will consider each.

Section 1132(a)(2) allows participants in ERISA plans to sue plan fiduciaries for beaches of duty. The Supreme Court held in *Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 144 (1985)*, that § 1132(a)(2) only allows participants to sue for breaches that cause losses to the ERISA plan itself, not for purely individual damages. Here, Jackson alleges that he was not paid benefits due him and that the defendants' misdeeds caused him to incur a variety of costs. These are, respectively, claims for benefits due and for extra-contractual damages. Neither of these is a loss to the plan itself; therefore these alleged injuries are not cognizable under § 1132(a)(2). Id.

Section 1132(a)(3) allows participants to pursue individual equitable relief for breaches of fiduciary duty. *Varity Corp. v. Howe*, 516 U.S. 489, 509 (1996). The defendants argue that it is unavailable here for two reasons: (1) Jackson did not exhaust his administrative remedies and (2) he has not requested equitable relief. Under controlling Third Circuit precedent, a plaintiff must exhaust his administrative remedies only when claiming that a plan administrator improperly denied him benefits, not when claiming that the administrator violated substantive provisions of ERISA. *Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 252 (3d Cir. 2002). But exhaustion does apply when a plaintiff "merely recast[s] [a] benefits claim in statutory terms." Id. Here, Jackson claims that the defendants breached their duty of loyalty by harassing him, threatening him, and suspending his benefits without cause. This is not,

as the defendants argue, merely a recasting of a claim for benefits; rather, it is a claim that plan fiduciaries used their power over Jackson's disability benefits to harass him and cause him distress. Because these allegations are distinct from his claim in Count VI (see *infra)* that the defendants also denied him benefits due, the exhaustion requirement does not apply, and his claim may go forward.

The defendants also argue that Jackson's claim fails because the statute does not provide the monetary relief that he seeks. They are correct that a court is limited to granting only "those categories of relief that were typically available in equity" to remedy violations under 29 U.S.C. § 1132(a)(3). *Mertens v. Hewitt Assocs* , 508 U.S. 248, 256 (1993) (emphasis omitted). Accordingly, they are also correct that his request for money damages is out of bounds. Id. at 255. But Jackson has also requested equitable relief, Am. Compl. Par. 62, and that request may proceed.

Because Jackson has requested equitable relief and because his claim appears not to be subject to the exhaustion requirement, I will deny the defendants' motion to dismiss Count III and allow it to proceed as a 29 U.S.C. § 1132(a)(3) claim for individual equitable relief.[9]

2. Count V - Interference with Benefits

Jackson alleges that the defendants violated ERISA § 510 (29 U.S.C. § 1140) by harassing him, threatening to cut off his benefits, and suspending his benefits. Section 510 makes it illegal for anyone to "discharge, fine, suspend, expel, discipline, or

discriminate against a participant" in an employee benefit plan for exercising her rights under the plan or to prevent her from becoming eligible for a benefit. 29 U.S.C. § 1140. Unlike other ERISA provisions that protect the employee from malfeasance in the claims administration process, § 510 reaches back "to protect the employment relationship which *gives rise* to an individual's pension rights." *Deeming v. Am. Standard, Inc.*, *905* F.2d 1124, 1127 (7th Cir. 1990). Accordingly, § 510 suits are limited to complaints about "actions affecting the employer-employee relationship." *Haberern v. Kaupp Vascular Surgeons Ltd Defined Benefit Pens. Plan.*, 24 F.3d 1491, 1503 (3d Cir. 1994). Here, though Jackson has alleged conduct unbecoming an ERISA fiduciary, he has not alleged any action affecting his status as an employee. *See Am. Compl. Pars. 66-67. Section* 510 is not, therefore, an appropriate cause of action for the facts he alleges, and I will dismiss it.

3. Count VI - Denial of Benefits

Jackson alleges that the defendants' temporary suspension of his disability benefits deprived him of benefits due him under his disability benefits plan in violation of ERISA § 502(a)(1)(B) (29 U.S.C. § 1132(a)(1)(B)). The defendants respond that his benefits were reinstated, and so he has received everything due him under the plan. While it is true that the complaint focuses on the alleged delay in paying benefits, Jackson does reference "benefits not paid," in addition to those "not timely paid." Am. Compl. Par. 62. At this stage, I must accept as true Jackson's allegation that not all benefits due him were paid. *DeBenedictis v. Merrill Lynch & Co.*, 492 F.3d 209, 215 (3d Cir. 2007).

Liberty Life further argues that Jackson has not alleged that he exhausted his administrative remedies under the plan. They are correct, both that the allegation does not appear in Jackson's complaint and that alleging exhaustion is generally required. *Harrow*, 279 F.3d at 249. Jackson alleges that his benefits were improperly suspended, but he does not allege that he complied with the appeals process outlined in the plan. *See* Motion to Dismiss the Corrected Second Amended Civil Action Complaint, Ex. A, at 18-19 (Rohm & Haas Co. Health & Welfare Plan) (Docket No. 106). A plaintiff may maintain suit, however, if he can show that pursuing administrative remedies would be futile. *Harrow*, 279 F.3d at 249.

Here, though Jackson has not made an allegation of futility directly, he has alleged facts that would support such a finding. For example, he alleges multiple communications with the defendants in which he challenged their decisions. *See, e.g.*, Am. Compl. Par. 47(a) & (c). Though not styled as formal appeals, these communications may support the diligent pursuit of administrative relief. *See Harrow*, 279 F.3d at 250. Moreover, he alleges that his difficulty in obtaining benefits was not a product of a reasoned disagreement with the defendants over the content of the plan, but rather the product of personal animus against him. Am. Compl. Par. 58. In essence, this is an allegation that, as to Jackson, the defendants maintain a "fixed policy denying benefits." Id. Because Jackson has alleged facts that would excuse his failure to exhaust his administrative remedies, that failure is not fatal to his claim at this stage.

C. State-Law Claims

Jackson asserts four state-law causes of action fraud (Count VII), negligent misrepresentation (Count VIII), intentional infliction of emotional distress (Count IX), and civil conspiracy (Count X). These counts do not contain additional substantive allegations, Am. Compl. Pars. 70-79, so I presume that they are based on the previously alleged scheme to harass him, threaten him, and ultimately deprive him of his disability benefits.

The defendants argue that all four of these claims are preempted by ERISA. ERISA expressly preempts all state-law causes of action that "relate to an employee benefit plan." 29 U.S.C. § 1144(a). Accordingly, the Supreme Court has held that causes of action based on the improper processing of benefits are preempted. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48 (1987). Here, Jackson's claims not only relate to, but revolve around, the processing of his disability benefits. The alleged misrepresentations in his fraud and negligent misrepresentation claims have to do with the defendants' alleged pretense in processing his disability benefits claims. Similarly, the heart of Jackson's intentional infliction of emotional distress cause of action is that the defendants harassed him under the guise of processing those claims.[10]

Jackson argues that his claims avoid preemption because he "do[es] not challenge the administration of, or eligibility for, ERISA benefits." But he does. Indeed, as explained in Part II.B, *supra*, all but one of his ERISA causes of action survive the defendants' motions to dismiss because he has duly alleged that the defendants wrongfully administered his disability benefits. Moreover, he cannot plead around preemption

by recasting disputes over ERISA benefits in other forms. *See Aetna Health, Inc. v Davilla*, 542 U.S. 200, 214 (2004). Because all of his allegations are bound up in the claim administration process, I will dismiss all four of his state-law claims as preempted.

III. Conclusion

AND NOW, this 12th day of September, 2007, for the foregoing reasons, defendants' motions to dismiss will be GRANTED in part and DENIED in part. Plaintiff may pursue Counts I-IV and VI against all defendants. His ERISA § 510 (Count V) and state-law claims (Counts VII-X) are DISMISSED.

In consideration of expedition and economy for the parties and the court, it is

FURTHER ORDERED that the case is assigned to the Honorable M. Faith Angell, Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(A), Fed. R. Civ. P. 72(a) and Loc. R. Civ. P. 72.1 I(e) for pretrial management purposes, including but not limited to: utilization of Fed. R. Civ. P. 16 management procedures; resolution of all discovery disputes and requests for sanctions; issuance of pretrial management orders; amendments to pleadings and joinder of parties; conduct of settlement conferences as necessary; and seeking the consent of the parties for final resolution of the case by final judgment by the Magistrate Judge in accordance with 28 U.S.C. § 636(c) and Local Rule 72.1 111(b). The parties are expected to hold the discovery planning conference required by Rule 26(f) and complete their Rule 26(a)(1) self-executing initial disclosure required by Rule 16(a)(1) promptly and in

advance of the Rule 16(b) scheduling and planning conference with the court, unless the case is exempt from such disclosure by Rule 26(a)(1)(E).

BY THE COURT:
/s/ Louis H. Pollak
Pollak, J.-

Footnotes

[1]The Rohm & Haas defendants consist of Rohm & Haas Co. and Deanna May, a Manager of Health & Group Benefits Operation for Rohm & Haas.

[2]The Liberty Life defendants consist of Liberty Life Assurance Co.; Nancy Mayo, a manager at Liberty Life; and Lori Hamlin, a Senior Disability Case Manager at Liberty Life. Am. Compl. Pars. 8-11. There are also 25 John Doe defendants that are alleged to be agents of either Rohm & Haas or Liberty Life. Am. Compl. Par. 7. I also note that the initial complaint named numerous other defendants who were not named in the second amended complaint at issue now

[3]The defendants argue that these defects prevent Jackson from maintaining Count I. Moreover, they argue that because Count II merely adds a conspiracy allegation to Count I, it is defective for the same reasons. I agree that Counts I and II rise and fall together, so I will consider them concurrently.

[4]The *Jackson III* litigation is similar insofar as it involves the same plaintiff and virtually the same defendants. It, however, concerns events that occurred after those of which Jackson complains in this case.

[5]Because mail and wire fraud are so similar, I will considered the allegations of each together. *See United States v. Morelli*, 169 F.3d 798, 806 n.9 (3d Cir. 1999)

(noting that "the wire fraud and mail fraud statutes differ only in form, not in substance").

[6]As I noted in my March 9, 2006, opinion in this case, it is doubtful that expenses related to the *Jackson I* litigation are cognizable injuries to business or property. 2006 WL 680933, at *5 n.6 (E.D. Pa. March 9, 2006). But since Jackson has alleged other injuries that are cognizable, it is unnecessary to resolve those doubts at this time.

[7]Rohm & Haas allegedly acted as "Plan Administrator" of the disability benefits plan, and Liberty Life allegedly acted as "Claims Administrator." Am. Compl. Par. 38. Both are alleged to have exercised enough discretion to be "fiduciaries" of the plan for ERISA purposes. Id.; *see* also 29 U.S.C. § 1002(21)(A) (ERISA definition of "fiduciary").

[8]The other ERISA causes of action open to plan participants are for refusal to provide information, 29 U.S.C. § 1132(a)(1)(A); denial of benefits, 29 U.S.C. § 1132(a)(1)(B); failure to provide information in Internal Revenue registration statements, 29 U.S.C. § 1132(a)(4); and wrongful purchase of an insurance contract or annuity in connection with the termination of the plan, 29 U.S.C. § 1132(a)(9). Of these, the only one that seems to fit the alleged facts is a claim for denial of benefits, which I deal with in connection with Count VI, *infra*.

[9]I will also allow Count IV to proceed, as the defendants object to it on the same grounds that I have rejected in the context of Count III.

[10]The conspiracy charge (Count X) rests on the predicate torts alleged in Counts VII-IX. It does not contain any additional substantive allegations, save that the defendants acted with a common purpose. *See* Am. Compl. Par. 79.

Civil Action No. 06-3682
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

MARK JACKSON, Plaintiff,

v.

ROHM & HAAS COMPANY, et al., Defendants

MEMORANDUM/ORDER
September 5, 2007

The dispute between Mark Jackson and the defendants-principally Rohm & Haas Co. and Liberty Life Assurance Co. but also employees of the two companies[1]-has been the subject of numerous lawsuits in both state and federal court. The above-captioned action is the third suit Mr. Jackson has brought in this court. In this suit, Jackson contends that defendants' actions in terminating his employment at Rohm & Haas and discontinuing his disability benefits violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., 42 U.S.C. § 1981, 42 U.S.C. § 1985, 42 U.S.C. § 1986, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. Jackson also alleges supplemental state law claims of fraud, negligent misrepresentation, intentional infliction of emotional distress, and civil conspiracy. Defendants have filed two motions to dismiss, which are presently before the court. For the reasons explained herein, the motions will be granted in part and denied in part.

I. Facts

The details of the several *Jackson* cases are so involved as to defy concise summary. However, I will undertake to set out what appear to be the salient facts in order to explain how the parties reached the present stage of litigation. In doing so, I will draw upon my March 9, 2006 opinion in *Jackson v. Rohm & Haas Co., No. 05-4988, 2006 WL 680933 (Jackson II)*:

> This litigation has a relatively lengthy history. It all began when plaintiff Mark Jackson went on a date with a co-worker, and she subsequently accused him of sexually assaulting her. This accusation led defendant Rohm & Haas, Jackson's employer, to question Jackson about the date and to conduct an investigation into the allegation. Rohm & Haas was ultimately unable to substantiate the allegation, and it took no action against Jackson. Nevertheless, Jackson found his interrogation by Rohm & Haas personnel so abrasive that he sued Rohm & Haas in a Pennsylvania state court for invasion of privacy and intentional infliction of emotional distress. During discovery in the state-court case, a dispute arose as to the authenticity of a document containing some notes taken by a Rohm & Haas employee during investigation of the assault allegation. Jackson accused Rohm & Haas and its lawyers of falsifying evidence. The state court eventually disposed of the lawsuit in favor of Rohm & Haas on the ground that, whether or not Jackson's common law tort claims against Rohm & Haas had factual merit, those claims were preempted by the state workers' compensation statute. *See Jackson v. Rohm & Haas* Co., 56 Pa. D. & C. 4th 449 (Phila. Co.

2002). This ruling was sustained on appeal. *See* Jackson v. McCrory, 833 A.2d 1155 (Pa. Super. Ct. 2003); *Jackson v.* McCrory, 849 A.2d 1205 (Pa. 2004).

Jackson then brought a federal action against Rohm & Haas, several of its employees, and the lawyers who represented it in state court, realleging falsification of evidence during the state court proceedings and contending that this amounted to, *inter* alia, a violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq. That suit will be referred to as *Jackson I*. This court dismissed the complaint in *Jackson I* by order dated June 30, 2005. *See Jackson v. Rohm & Haas Co.*, 2005 WL 1592910 (E.D. Pa. June 30, 2005).1 concluded that Jackson lacked standing to bring a RICO claim because his injury (loss of the state-court case) was not proximately caused by defendants' alleged fraud - that is, since the state-court ruling was based on statutory preemption rather than a finding on the merits of Jackson's privacy and infliction-of-emotional-distress claims, Jackson would have lost whether or not defendants had falsified evidence that went to the merits of the tort claims. Id. at 4-5. Because RICO was the only basis for federal jurisdiction, I dismissed the entire complaint, declining to exercise supplemental jurisdiction over the remaining state-law claims. Id. at 5....

On September 19, 2005 . . . Jackson filed another lawsuit in this Court [*Jackson II*] claiming that the *Jackson* I defendants (Rohm & Haas, Rohm & Haas employees, and their state-court lawyers), plus the lawyers who

> represented the *Jackson I* defendants, plus Rohm & Haas's disability insurance administrator, Liberty Life, engaged in improper conduct in connection with *Jackson I*.

Opinion and order of March 9, 2006, *Jackson II*, No. 05-4988, 2006 WL 680933, at * 1 (E.D. Pa. March 9, 2006).

In response to the amended complaint in *Jackson II*, the defendants in that suit[2] moved for Rule 11 sanctions, contending, *inter alia*, that the *Jackson II* complaint contained frivolous and unwarranted allegations. Id. at *2. On March 9, 2006, I granted defendants' Rule 11 motions.

Seeking to add claims arising from his termination and the cessation of his disability benefits to his federal lawsuit, Jackson moved this court for leave to amend the complaint in *Jackson II* on May 17, 2006. Because I found that the proposed amendment contained statements that I had previously sanctioned in my March 9, 2006 opinion, I denied leave to file the proposed amended complaint without prejudice to filing a further proposed amended complaint. I stated that "[i]f Jackson wishes to renew his effort to file an amended pleading that presents claims based on his alleged termination by Rohm & Haas, he may try to do so, but he will not be permitted to append those claims to claims that have already been adjudicated frivolous." Memorandum/Order of July 7, 2006, *Jackson* II, No. 05-4988, 2006 WL 1892661, at * 1 (E.D. Pa. July 7, 2006).

Rather than renewing his attempt to amend the *Jackson II* complaint to include claims based on his termination, Jackson filed the present federal action,

Jackson III, which focuses on claims concerning his termination and the cessation of his disability benefits. The amended complaint alleges that, on February 16, 2006, Jackson's counsel wrote a letter to counsel for Rohm & Haas and counsel for Liberty Life, advising that plaintiff had been medically cleared to return to work after having been on disability leave since 2000. Am. Compl. Par. 44. On or about February 22, 2006, counsel for Rohm & Haas informed plaintiff that counsel was not involved in determinations about plaintiff's disability and employment status.[3] On or about February 23, 2006, plaintiff notified Rohm & Haas and Liberty Life directly that he had been medically released to return to work .[4] Am. Compl. Pars. 45-46. Liberty Life then sought confirmation from plaintiff's doctor that he had been medically released. Am. Compl. Par. 49.

On March 10, 2006, a case manager at Liberty Life informed plaintiff that his disability benefits would be discontinued on that date, based on plaintiff's counsel's representations that plaintiff was medically cleared to return to work. Am. Compl. Par. 52. On April 7, 2006, Rohm & Haas sent a letter to plaintiff, which he received on or about April 10, 2006, informing him that, because the position he had held prior to going on disability in 2000 had been eliminated when Rohm & Haas sold its Agricultural Chemicals business in 2001, his employment was terminated as of March 10, 2006-the date as of which Liberty Life determined that Jackson was no longer eligible for disability benefits. Am. Compl. Par. 53.

Jackson III was filed on August 18, 2006. The amended complaint was filed on October 12, 2006. The

amended complaint is the subject of defendants' Rule 12(b)(6) motions to dismiss, which, after substantial briefing, are now ripe for disposition.

II. Analysis

When reviewing a motion to dismiss under Rule 12(b)(6), a court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002). The court, however, "need not credit a complaint's `bald assertions' or `legal conclusions.'" *Cal. Pub. Employee Ret. Sys. v. The Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004) (citing *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997)). The motion will not be granted unless the court is satisfied "that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

A. RICO Claims (Counts I-VI) (against all defendants)

Plaintiff has brought several RICO claims against all defendants alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, et seq. In these claims, Jackson contends that each of the corporate defendants-Rohm & Haas and Liberty Life-constitutes

a RICO enterprise and that defendants were acting through these enterprises in a way that "constitutes conduct of an enterprise through a pattern of racketeering activity." Am. Compl. Par. 56. Defendants move to dismiss the RICO claims in their entirety, arguing that plaintiff has not satisfied the basic requirements for a RICO complaint.

RICO was designed to prevent the "infiltration of legitimate business by organized crime." *United States v. Turkette*, 452 U.S. 576, 591 (1981). Plaintiff asserts causes of action under § 1962(c), which directs that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). "In order to plead a violation of RICO, plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Lum* v. *Bank of America*, 361 F.3d 217, 223 (3d Cir. 2004); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). There must be at least two predicate acts of racketeering to constitute a "pattern of racketeering activity." *See* 18 U.S.C. § 1961(5). Racketeering activity includes any act that is "indictable" under the federal criminal statutes set forth in 18 U.S.C. § 1961(1).

Plaintiff alleges the following racketeering activity in his amended complaint: obstruction of justice in violation of 18 U.S.C. § 1513(e) (Count I), 18 U.S.C. § 15130 (Count II), 18 U.S.C. § 1512(b) (Count III), and 18 U.S.C. § 1512(g) (Count IV); mail and wire fraud in violation of 18 U.S.C. § 1341 and § 1343 (Count V); and conspiracy in violation of 18 U.S.C. § 1962(d) (Count VI). Am. Compl. Pars. 54-81.

Defendants, in their motions to dismiss, contend that plaintiff has not pled the essential elements of a RICO claim. Specifically, defendants claim that plaintiff has not adequately alleged a distinct enterprise that is "separate and apart from the pattern of [racketeering] activity in which it engages," *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 790 n.5 (3d Cir. 1984). Further, defendants contend that the alleged racketeering acts do not constitute a "pattern" of racketeering activity.

1. Enterprise Element

Turning first to the enterprise element, the law is clear that "a viable § 1962(c) action requires a claim against defendant `persons' acting through a distinct `enterprise.'" *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 268 (3d Cir. 1995). It is also well established that a corporation can serve as the enterprise through which a defendant employee conducted his or her racketeering activity. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164-65 (2001).

Here, plaintiff alleges that both Rohm & Haas and Liberty Life constitute associations-in-fact or

enterprises within the meaning of RICO and that several of the corporations' employees are persons carrying out racketeering activity through these enterprises. Am. Compl. Par. 56. Jackson additionally contends that Rohm & Haas and Liberty Life are "persons" acting "by and through each other" in the "enterprises' affairs through a pattern of racketeering activity." Am. Compl. Par. 56. Defendants object to this, arguing that plaintiff's use of Rohm & Haas and Liberty Life both as "enterprises" and as "persons" runs afoul of the rule that "a claim simply against one corporation as both `person' and `enterprise' is not sufficient." Jaguar Cars, 46 F.3d at 268.

Based on a fair reading of the complaint, plaintiff appears to assert (1) two separate enterprises, the Rohm & Haas enterprise and the Liberty Life enterprise, and (2) that Rohm & Haas and Liberty Life each acted as a "person" in the other enterprise. Plaintiff does not contend that Rohm & Haas was a "person" acting within the Rohm & Haas enterprise, or that Liberty Life was a "person" acting within the Liberty Life enterprise. Under this reading of the complaint, Jackson has not run afoul of the distinctiveness requirement and has sufficiently alleged the enterprise element of his RICO claim.

2. Pattern of Racketeering Activity

Defendants contend that plaintiff has failed to assert a pattern of racketeering activity. *See Swistock v. Jones*, 884 F.2d 755, 758 (3d Cir. 1989). To survive a motion to dismiss, plaintiff must allege that the predicate acts[5] said to constitute a pattern of racketeering activity are "related"[6] and demonstrate a

"threat of continuing activity." *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989). The "threat of continuing activity" also known as "continuity" is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." Id. at 241.

Defendants argue that Jackson's RICO claims must be dismissed because they do not satisfy either closed-ended or open-ended continuity. With regard to closed-ended continuity, defendants contend that the amended complaint relies on predicate acts "that occurred in the space of less than two months, from February 16, 2006-the date [counsel for Jackson advised Rohm & Haas and Liberty Life that Jackson] was no longer disabled and wished to return to work-to April 7, 2006-when Rohm & Haas informed him that he did not have a job to which he could return." Rohm & Haas Defs.' Mem. at 9.

To constitute closed-ended continuity, the predicate acts must occur over a "substantial period of time." Id. at 241. "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. Congress was concerned in RICO with long-term criminal conduct." Id. Plaintiff contends that the predicate acts alleged in *Jackson* I and *Jackson* II can be appended to the alleged retaliation acts in *Jackson* III to meet the closed-ended continuity requirement. This is not the case. Plaintiff cannot bootstrap claims from his prior lawsuits to satisfy the continuity requirement in the present action. Plaintiff's amended complaint in *Jackson* III focuses on his termination from Rohm &

Haas and the cessation of his disability benefits. Plaintiff had the opportunity to amend his complaint in *Jackson* II to add claims arising out of his termination but chose not to do so. *See* Memorandum/Order of July 7, 2006, *Jackson* II, 2006 WL 1892661, at * 1. Jackson instead decided to pursue a separate lawsuit-*Jackson* III-in lieu of amending his complaint in *Jackson* II.

Nor can plaintiff satisfy the requirements for open-ended continuity. Open-ended continuity occurs when past conduct threatens to repeat itself. *See H.J., Inc*, 492 U.S. at 242. The Supreme Court has used the example of "a hoodlum [selling] `insurance' to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the `premium' that would continue their 'coverage.'" Id. As the Court explained, "though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity." Id. Jackson is no longer affiliated with Rohm & Haas and Liberty Life; thus, there is no threat of repetition extending into the future.

"Another example [of open-ended continuity] is that of an ongoing entity which commits the predicate acts or offenses as its regular way of doing business." *Tabas v. Tabas*, 47 F.3d 1280, 1293 (3d Cir. 1995). Plaintiff asserts that the fact that he has brought four lawsuits against Rohm & Haas demonstrates that defendants' "practice is to defend itself by engaging in racketeering activity." Pl.'s Opp. at 10. However,

plaintiff's aptitude for litigation does not constitute evidence that the defendants engage in racketeering activity in their regular course of business.

Plaintiff has provided no indication that the alleged racketeering activity in Jackson III carries the threat of repetition or that it is a regular way of conducting the business of either of the corporate defendants. Accordingly, I find that plaintiff has not alleged open-ended continuity.

Because plaintiff's complaint fails to allege either closed-ended or open-ended continuity, I will grant defendants' motion to dismiss plaintiff's RICO claims for failure properly to allege a pattern of racketeering activity.

B. 42 U.S.C. § 1985 and § 1986 (Counts VII-X) (against all defendants)

Plaintiff next asserts that all of the defendants-Rohm & Haas, Liberty Life, and the individual defendants-conspired, in violation of 42 U.S.C. § 1985(2) and (3)[7] (Counts VII-IX) and § 1986[8] (Count X), to deter him from proceeding with his claims in *Jackson I* and *Jackson II* (Count VII); and to deprive him of the equal protection of the laws based on his race (African-American) and disability (depression) (Counts VIII and IX)). He has also alleged a § 1986 claim alleging a conspiracy to violate § 1985 (Count X).

1. 42 U.S.C. § 1985(2)(first clause) (Count VII) (against all defendants)

Plaintiff's Count VII arises under the first clause

of § 1985(2), which makes it unlawful to conspire to "deter, by force, intimidation, or threat, any party ... in any court of the United States from attending such court, or from testifying ... or to injure such party in his person or property on account of his having so attended or testified." Jackson contends that defendants attempted to deter him from proceeding in the *Jackson I* and *Jackson II* litigation by thwarting his return to active service and terminating his employment and benefits with Rohm & Haas. Defendants move to dismiss the count on the ground that the doctrine of intracorporate conspiracy bars the claim. *See* Rohm & Haas Defs.' Mem. at 30-32.

A successful § 1985(2)(first clause) claim requires a showing of "(1) a conspiracy between two or more persons (2) to deter [a party in a federal case] by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiff[]." *Malley-Duff & Assoc. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d Cir. 1986). With regard to whether plaintiff has sufficiently pled the first element-conspiracy-against the corporate defendants-I refer to this court's holding in *Jackson II:*

> Jackson's 42 U.S.C. § 1985 count is also frivolous. The thrust of the claim is that Rohm & Haas conspired with Liberty Life to deny Jackson disability benefits in order to leverage him out of the *Jackson* I litigation, in contravention of 42 U.S.C. § 1985. But Jackson's complaint does not support a finding of conspiracy between the two companies. Jackson's complaint alleges that Rohm & Haas acted "by and through" Liberty Life-i.e., in an agency relationship-to interrupt

> his disability benefits. Nothing in the complaint suggests that Liberty Life exceeded the scope of its agency and acted solely in its own interests when it interrupted Jackson's benefits. The intracorporate conspiracy doctrine therefore precludes existence of a conspiracy. *See Heffernan v. Hunter*, 189 F.3d 405, 411-13 (3d Cir. 1999); *School Lane House Philadelphia, LLC v. RAIT Partnership*, 2005 WL 2397146 (E.D. Pa. Sept. 27, 2005).

Opinion and order of March 9, 2006, *Jackson II*, 2006 WL 680933, at *6.

Nothing in the *Jackson* III complaint changes the conclusion I reached in *Jackson* II. Plaintiff once again asserts (1) that Rohm & Haas and Liberty Life were acting "by and through" each other, Am. Compl. Par. 56; (2) that Rohm & Haas had "contracted with Liberty Life to provide certain insurance-related services," Am. Compl. Par. 16; and (3) that together, Rohm & Haas and Liberty Life acted to thwart plaintiff's active return to service. The doctrine of intracorporate conspiracy, as I noted in *Jackson* II, directs that a corporation cannot conspire with itself, its employees, or its agents, unless the employee or agent was acting in a personal, rather than an official, capacity. *See Heffernan, 189* F.3d at 412. The amended complaint does not allege that Liberty Life exceeded the scope of delegated authority. Accordingly, the doctrine of intracorporate conspiracy requires that plaintiff's claim under § 1985(2)(first clause) against Rohm & Haas and Liberty Life must be dismissed.

With regard to the individual defendants, it is

well established that employees of an entity cannot conspire with that entity unless they are acting in a personal capacity in undertaking the conspiracy. *Robinson v. Canterbury Vill., Inc.*, 848 F.2d 424, 431 (3d Cir. 1988). The complaint contains no allegations that the individual defendants (who are all employees of either Rohm & Haas or Liberty Life) were acting in a personal capacity in the events constituting Jackson's termination and cessation of benefits; thus, he has failed to state a claim on which relief can be granted.[9]

2. 42 U.S.C. § 1985(2)(second clause) (Count VIII) (against all defendants)

Count VIII arises under the second clause of § 1985(2), which prohibits conspiracies to obstruct justice in the state courts with the intent to deprive a citizen of equal protection of the laws. *Kush v. Rutledge*, 460 U.S. 719, 722-25 (1983). Count VIII fails for the same reasons as Count VII: a corporation cannot conspire with its officers, directors, or agents. Count VIII fails for an additional reason, as well. In order to state a claim under the second clause of § 1985(2), the plaintiff must allege class-based, invidiously discriminatory animus. Id. at 722-23; *see also Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976). Here, Jackson alleges that the defendants were motivated "by invidious, class-based discrimination based upon plaintiff's race (African-American) and disability (depression)." Am. Compl. Par. 88. However, Jackson fails to allege any facts pointing to the existence of class-based animus grounded in race or disability. Since Jackson has cited "no facts that would suggest the existence of race or class-based animus... these claims will be dismissed." *Messa v. Allstate Ins. Co.*, 897 F. Supp. 876, 882 (E.D.

Pa. 1995).

3. 42 U.S.C. § 1985(3) (Count IX) (against all defendants)

Count IX arises under § 1985(3), which prohibits conspiracies to deprive a "person or class of persons of the equal protection of the laws." The doctrine of intracorporate conspiracy, as discussed above, is fatal to plaintiff's § 1985(3) claim as well. Moreover, as the Supreme Court has noted, § 1985(3), like the second clause of § 1985(2), contains "language requiring that the conspirators' actions be motivated by an intent to deprive their victims of the equal protection of the laws," *Kush, 460* U.S. at 725, meaning " that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."' Id. at 726 (quoting *Griffin v. Breckenridge,* 403 U.S. 88, 102 (1971)). Just as with plaintiff's Count VIII § 1985(2)(second clause) claim, the complaint contains no factual allegations to support Jackson's allegation of race discrimination or discrimination based on disability. *Messa,* 897 F. Supp. at 882. Accordingly, the claim will be dismissed.

4. 42 U.S.C. § 1986 (Count X) (against all defendants)

Count X of Jackson's complaint alleges that defendants violated § 1986 because defendants "had the power to prevent or aid in the prevention of a violation of § 1985." Am. Compl. 93. "Because transgressions of § 1986 by definition depend on a preexisting violation of § 1985, if the claimant does not set forth a cause of action under the latter, its claim under the former

necessarily must fail also." *Rogin v. Bensalem Twp.*, 616 F.2d 680, 969 (3d Cir. 1980); *see also* Opinion and order of March 9, 2006, *Jackson* II, 2006 WL 680933, at *6, n.10 ("The validity of Jackson's § 1986 claim depends on the validity of his § 1985 claim, and the § 1986 claim therefore falls with the § 1985 claim."). The dismissal of plaintiff's § 1985 claims is fatal to Jackson's § 1986 claim.

C. 42 U.S.C. § 1981 (Count XI) (against Rohm & Haas only)

Count XI of plaintiff's complaint alleges that Rohm & Haas discriminated against plaintiff on the basis of his race (African-American) in violation of 42 U.S.C. § 1981. Rohm & Haas moves to dismiss this claim.

Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a). Section 1981 claims are analyzed under the *McDonnell Douglas* burden-shifting framework. *See Pamintuan v. Nanticoke Mem. Hosp.*, 192 F.3d 378, 385 (3d Cir. 1999). In order to establish a prima facie case, Jackson must show that (1) he is a member of a protected class, (2) he satisfactorily

performed the duties required by his position, (3) he suffered an adverse employment action, and (4) either similarly-situated non-members of the protected class were treated more favorably or the adverse job action occurred under circumstances that give rise to an inference of discrimination. *See Sarullo v. United States Postal Serv.*, 352 F.3d 789, 797 (3d Cir. 2003). Once plaintiff has established a prima facie case, the burden shifts to the defendants to articulate a legitimate, non-discriminatory reason for the challenged action. Id.

A plaintiff need not establish his prima facie case to survive a motion to dismiss. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-12 (2002). Rather, a plaintiff "need only give respondent fair notice of what petitioner's claims are and the grounds upon which they rest." Id. at 514. However, the complaint's "factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007).

Jackson has provided no indication of the facts giving rise to a claim of discrimination. He merely states that he was terminated-possibly in violation of Rohm & Haas's policies-but there is nothing in the amended complaint to connect Jackson's termination with his claim for racial discrimination. Jackson has not "nudged [his] claims across the line from conceivable to plausible"; accordingly, Count XI of the amended complaint "must be dismissed." Id. at 1974.

D. ERISA, § 510 (Count XII) (against all defendants)

Plaintiff's complaint next asserts that all of the

defendants took adverse action against Jackson because he exercised his right to receive ERISA-protected benefits in violation of § 510 of ERISA, 29 U.S.C. § 1140. Section 510 of ERISA provides that, in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a [plan] participant or beneficiary ... for the purpose of interfering with the attainment of any right to which such participant may become entitled to under [an employee benefit plan], this subchapter, or the welfare and Pension Plans Disclosure Act....

Section 510 claims, like other employment discrimination cases, follow the *McDonnell Douglas* burden-shifting analysis. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir. 1987). "To establish a prima facie case under ERISA § 510, an employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." Id.

The Rohm & Haas defendants assert that they did not act with the requisite intent to interfere with Jackson's ERISA benefits. *See* Rohm & Haas Defs.' Mem. at 38-41. This is the proper subject of a motion for summary judgment, not a motion to dismiss. It suffices that plaintiff has pled facts sufficient to "raise a right to relief above the speculative level." Twombly, 127 S. Ct. at 1965. Accordingly, the Rohm & Haas defendants' motion to dismiss plaintiff's § 510 claim will be denied.

With regard to the Liberty Life defendants' motion to dismiss the § 510 claim, the court recognizes that there is a lack of harmony in the caselaw concerning the ability of non-employers to be liable under § 510. *Compare Byrd v. MacPapers, Inc.*, 961 F.2d 157, 161 (11th Cir. 1992) (holding that insurer of employer's employee benefits plan was not liable on § 510 retaliatory discharge claim because "retaliatory discharge claim under § 510 of ERISA lies only against ... [the] employer"); with Custer v. *Pan Am. Ins. Co.*, 12 F.3d 410, 421 (4th Cir. 1993) (holding that "we cannot agree with the defendants that Congress intended to limit those who could violate § 1140 to employers"), *and Plain v. AT&T Corp.*, 424 F. Supp. 2d 11, 19 & n.9 (D.D.C. 2006) (holding that "non-employer liability is permitted by Section 510").

In reaching its conclusion, the court in Custer looked to ERISA's definitions section, 29 U.S.C. § 1002, to determine that ERISA defines "person" as "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." It is thus understandable that Congress intended its use of the word "person" in § 510 would be in accordance with the Act's own definitions provision. Moreover, while the primary concern of § 510 is to prevent retaliatory actions by employers, such as discharge, suspension, expulsion, and discipline, the statute also prohibits "discrimination," and activity which could conceivably be undertaken by a third party, such as an employee benefits plan insurer. *See Custer*, 12 F.3d at 421.

This court agrees with *Custer* that Congress's

use of the word "person" in § 510, rather than "employer," means that an employee benefits plan insurer and its employees can be liable under § 510. Jackson has properly pled a § 510 claim against the Liberty Life defendants. Accordingly, the Liberty Life defendants' motion to dismiss the § 510 claim will be denied.

E. ERISA, Fiduciary and Co-Fiduciary Claims (Counts XIII and XVI) (against Rohm & Haas and Liberty Life only)

Plaintiff contends that defendants Rohm & Haas and Liberty Life breached their fiduciary duties to him in conjunction with his intended return to active service. ERISA § 502, 29 U.S.C. § 1132, creates a civil cause of action for violations of 29 U.S.C. § 1104(a),[10] which requires a fiduciary to, *inter alia*, "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." Section 1105(a) also establishes co-fiduciary liability in certain circumstances[11] For redress of the alleged breaches of fiduciary duty, Jackson seeks "judgment against defendants ... jointly and/or severally, in an amount in excess of $150,000, exclusive of interest and costs." Am. Compl. Par. 105. Defendants move to dismiss plaintiff's § 1104 claim on the basis that the monetary relief plaintiff seeks is not available because the civil enforcement provision in § 1132 under which plaintiff proceeds only provides for equitable remedies. Rohm & Haas Defs.' Mem. at 49-50.

Section 1132 provides the civil enforcement mechanisms under which a plaintiff may redress violations of ERISA. In his amended complaint,

plaintiff does not specify under which provision he brings his § 1104 claim. Thus, the court must first determine under which of § 1132's civil enforcement provisions plaintiff brings his § 1104 claim and then assess what type of relief is available under that provision.

There are five potential statutory avenues under which a plan participant may bring suit.[12] *See* 29 U.S.C. § 1132; *see also Kishter v. Principal Life Ins. Co.*, 186 F. Supp. 2d 438, 441-42 (S.D.N.Y. 2002) (describing civil enforcement provisions of § 1132). First, a participant may bring suit under § 1132(a)(1)(A) if a plan administrator does not comply with its duties to furnish the participant with plan information as required under § 1132(c). Second, a participant may bring suit under § 1132(a)(1)(B) to "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Third, a participant may bring suit under § 1132(a)(2) to obtain "appropriate relief' on behalf of the plan for breaches of fiduciary duties. Fourth, a participant may bring suit under § 1132(a)(3) "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or ... to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." Fifth and finally, a participant may bring suit under § 29 U.S.C. § 1132(a)(4) "to obtain appropriate relief' when the plan administrator fails to provide information to the Internal Revenue Service.

Looking at the amended complaint, it is clear that the first, second, and fifth avenues of enforcement

are not relevant to this case: plaintiff is not alleging that defendants violated their statutory duties to provide plan information as defined by § 1132(c); plaintiff's own memoranda in opposition to defendants' motions to dismiss indicate that he is not bringing a claim concerning his benefits under the plan; *see Pl.'s Opp. at* 63 ("[The suit] has been brought to address defendants' misconduct in failing to carry out their duties, and not because there was a dispute over a denial of benefits."); and plaintiff is not alleging that the plan administrator failed to report information to the IRS. While the third avenue, § 1132(a)(2), concerns fiduciary duties, it only allows a participant to seek recovery on behalf of the benefits plan and does not provide for an individual participant to bring suit to recover for personal losses. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985) (holding that § 1132(a)(2) "inures to the benefit of the plan as a whole" and does not provide an individual plaintiff a means of recovery).

Plaintiff's claim is clearly one for individual relief rather than a suit on behalf of the benefits plan. Thus, the fourth avenue, § 1132(a)(3), must govern Jackson's individual claim for breach of fiduciary duty.

Section § 1132(a)(3) functions as ERISA's "catch-all" remedial section, which authorizes "appropriate equitable relief" to redress ERISA violations. *See Vanity Corp. v. Howe*, 516 U.S. 489, 512 (1996). Courts routinely confirm its applicability to an individual participant's breach of fiduciary duty claims. *See, e.g., id. at* 515; *Bixler v. Cent. Penn. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1298-1300 & n.17 (3d Cir. 1993).

Understanding that Jackson must be proceeding on his § 1104 claim under § 1132(a)(3), it is incumbent on the court to determine whether the relief plaintiff seeks-judgment in an amount in excess of $150,000-is available under § 1132(a)(3). As § 1132(a)(3) has been interpreted by the Supreme Court in recent cases, it does not authorize the type of relief that plaintiff seeks.

In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Supreme Court read § 1132(a)(3)'s language of "appropriate equitable relief' to preclude an award of "compensatory damages-monetary relief for all losses [the] plan sustained as a result of the alleged breach of fiduciary duties." Id. at 255 (emphasis omitted). In so holding, the Court determined that § 1132(a)(3)'s use of "appropriate equitable relief' refers to "those categories of relief that were *typically* available in equity." Id. at 257 (emphasis in original). Almost ten years later, the Court reaffirmed its reading of § 1132(a)(3) in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 183 (2002), holding that a plaintiff who had been denied benefits as the result of a breach of fiduciary duty could not bring a claim under § 1132(a)(3) for monetary damages. Id. at 221. In the aftermath of these cases, courts have consistently held that monetary damages are not available under § 1132(a)(3). *See Kishter*, 186 F. Supp. 2d at 446 (reading *Mertens* and *Great-West* as precluding plaintiff's recovery of $270,000 in damages because "an individualized recovery" of money lost to plaintiff as a result of defendant's fiduciary breach is not "'appropriate equitable relief'" under § 1132(a)(3)); *see also Kollman v. Hewitt* Assoc., No. 03-2944, 2005 WL 1941658, at * 10 (E.D. Pa. Aug. 11, 2005) (collecting cases). *But see De Pace v. Matsushita Elec. Corp.*, 257

F. Supp. 2d 543, 564 (E.D.N.Y. 2003) (striking plaintiffs' claim for compensatory damages but allowing them to seek front pay).[13]

In the present case, where plaintiff "demands judgment against defendants ... jointly and/or severally, in the amount in excess of $150,000, exclusive of interest and costs," Am. Compl. Par. 105, he is clearly seeking monetary relief which is unavailable under the statute. Accordingly, because he is not entitled to the relief that he seeks, Jackson has failed to state a claim on which relief can be granted.

Because Jackson's § 1104 claim fails, his derivative § 1105 claim against Rohm & Haas and Liberty Life must be dismissed as well. *See Thomas v. Aris Corp.*, 219 F.R.D. 338, 339 n.1 (M.D. Pa. 2003) ("[Section 1105] merely provides for a derivative cause of action which is ultimately based upon a violation of a duty imposed by 29 U.S.C. § 1104.").[14]

F. Fraud (Count XV) (against all defendants)

In Count XV, Jackson presents a state-law claim of fraud against all defendants. Defendants move to dismiss this claim on the ground that Jackson has not adequately pled the elements of fraud.

To state a claim for fraud under Pennsylvania law, Jackson must plead "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting

injury was proximately caused by the reliance." *Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994). Federal Rule of Civil Procedure 9(b) requires that the elements of fraud be stated with particularity "in order to place defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Seville Indus. Mach. Corp. v. Southmost Corp.*, 742 F.2d 786, 791 (3d Cir. 1984).

Accepting plaintiff's allegations as true, he has sufficiently pled a claim of fraud. Jackson alleges that defendants, "intentionally and/or knowingly, and/or in reckless disregard for the truth," made misrepresentations that were material. Am. Compl. Par. 109. He further alleges that the misrepresentations were made "with the intent to defraud," and that he did "reasonably rely upon" them. Am. Compl. Pars. 109, 77-78. The complaint describes the alleged fraud with sufficient particularity to put defendants on notice of the alleged misconduct. *See* Am. Compl. Pars. 77-78. Finally, plaintiff contends that he was injured as a result of the alleged fraud; namely, he was terminated from his employment and his disability benefits were suspended. Am. Compl. 52-53. Any questions about whether defendants *in fact* made material misrepresentations and whether plaintiff *in fact* relied upon them will not be resolved at this stage in the litigation. When evaluating a motion to dismiss, the court is not concerned with whether the plaintiff will "ultimately prevail" on the claim, but whether he should be "entitled to offer evidence to support" the claim. *Scheuer*, 416 U.S. at 236. Jackson has sufficiently pled a claim for fraud, and I will deny defendants' motions to dismiss Count XV.

G. Negligent Misrepresentation (Count XVI) (against all defendants)

In Count XVI, plaintiff presents a state-law claim of negligent misrepresentation, which defendants move to dismiss on the same ground as the fraud claim, supra Part II.F. Unlike plaintiff's claim for fraud, the heightened pleading requirements of Rule 9(b) do not apply to negligent misrepresentation claims. *See TruePosition, Inc. v. Sunon,* Inc., No. OS-3023, 2006 WL 1451496 (E.D. Pa. May 25, 2006). Under Pennsylvania law,

> [t]he elements which must be proven for such a wrong to be shown are: (1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.

Gibbs, 647 A.2d at 890. Plaintiff has sufficiently pled these elements, alleging that "[d]efendants, intending to induce plaintiff to act, misrepresented material facts, either knowing of the misrepresentations or without knowledge as to their truth or falsity, upon which plaintiff justifiably relied, and which resulted in injury to plaintiff." Am. Compl. Par. 111. Accordingly, defendants' motions to dismiss Count XVI will be denied. H. Intentional

Infliction of Emotional Distress (Count XVII) (against all defendants)

Count XVII alleges a cause of action for intentional infliction of emotional distress against all defendants. As a Pennsylvania court has recently stated:

> There remains some question as to whether the courts of this Commonwealth recognize a cause of action for intentional infliction of emotional distress. However, our Supreme Court has indicated that in order for a plaintiff to prevail on such a claim, he or she must, at the least, demonstrate intentional outrageous or extreme conduct by the defendant, which causes severe emotional distress to the plaintiff. In addition, a plaintiff must suffer some type of resulting physical harm due to the defendant's outrageous conduct.

Reeves v Middletown Athletic Ass'n, 866 A.2d 1115, 1122 (Pa. Super. Ct. 2004) (citations omitted). The *Jackson III* amended complaint alleges no physical harm, rendering dismissal appropriate under *Reeves*. To combat dismissal, plaintiff alleges that he has been on "disability for a period of years due to severe depression." Pl.'s Opp. at 67. However, plaintiff's amended complaint asserts that he was medically cleared to return to work before the events underlying his intentional infliction of emotional distress claim occurred, and alleges no physical harm caused by defendants' actions. Accordingly, Jackson's intentional infliction of emotional distress claim will be dismissed.

I. Civil Conspiracy (Count XVIII) (against all defendants)

Finally, plaintiff's complaint contains an allegation of civil conspiracy against all of the defendants. This claim fails under the doctrine of intracorporate conspiracy, as discussed in Part IIB, *supra*.

III. Conclusion

AND NOW, this 5th day of September, 2007, for the foregoing reasons, defendants' motions to dismiss will be GRANTED in part and DENIED in part. Plaintiff may pursue

Footnotes

[1]In addition to Rohm & Haas and Liberty Life, plaintiff's complaint alleges causes of action against Raj L. Gupta, Chairman and CEO of Rohm & Haas; Robert A. Lonergan, Vice President and General Counsel of Rohm & Haas; Ellen Friedel, Assistant General Counsel of Rohm & Haas; Marilyn Orr, Human Resources Manager for Rohm & Haas; Lori Hamlin, Senior Disability Case Manager for Liberty Life; and twenty-five "John Doe" defendants, who "were officers, directors, executives, managers, committee members, administrators, attorneys, and other officials, representatives, and employees of R&H, Liberty Life, and/or others, and/or companies or individuals performing and/or providing various services to them, including but not limited to lawyers and/or law firms providing legal services." Most of these defendants have been named in one or another of the complaints in

plaintiff's previous lawsuits. For ease of reference throughout this opinion, I will refer to Rohm & Haas and its employees as the "Rohm & Haas defendants" and Liberty Life and its employees as the "Liberty Life defendants" where it is necessary to make such a distinction.

[2]The defendants in the original complaint in *Jackson II* were as follows: Rohm & Haas Company; Morgan Lewis & Bockius LLP and Conrad O'Brien Gellman & Rohn, P.C. (law firms that represented Rohm & Haas in the state-court litigation); Harkins Cunningham, LLP (the law firm that represented all defendants in *Jackson I*); Liberty Life Assurance Company of Boston; Robert Vogel, Celia Joseph, Royce Warrick, Michael McLaughlin, Wayne Davis, David Gartenberg, Ellen Friedel, and Jane Greenetz (employees of Rohm & Haas); James D. Pagliaro, Paul J. Greco, P. Daffodil Tyminski, and Aretha Delight Davis (attorneys at Morgan Lewis & Bockius); Nancy Gellman, William J. O'Brien, and Kelly G. Huller (attorneys at Conrad O'Brien Gellman & Rohn, P.C.); June McCrory (the person who accused Jackson of sexually assaulting her); John G. Harkins, Eleanor Morris Illoway, Steven A. Reed, and Coleen Healy Simpson (attorneys at Harkins Cunningham, LLP); and John Doe Nos. 1-25 ("attorneys, administrators, officers, directors, executives, managers, committee members, and other agents, officials, representatives, and employees" of the organizations listed as defendants).

[3]The February 22, 2006 letter from Rohm & Haas's counsel to plaintiff set off a flurry of communications between counsel for plaintiff and counsel for Rohm & Haas, in which plaintiff ultimately accused Rohm & Haas's counsel of intentionally interfering with plaintiff's return to work. Am. Compl. Pars. 45, 47, 50-

51.

[4]The amended complaint alleges that counsel for Rohm & Haas informed plaintiff in the February 22, 2006 letter that he should direct correspondence concerning his disability and employment to Liberty Life, presumably prompting plaintiff's letter on February 23, 2006. However, after receiving plaintiff's letter of February 23, 2006, Liberty Life in turn informed plaintiff that Liberty Life was only involved in the administration of plaintiff's disability benefits and was not involved in plaintiff's "employment initiatives." Am. Compl. Pars. 45, 48. Plaintiff asserts that these and other communications were "part of a scheme to interfere with and deny plaintiff employment and benefits to which he was entitled, to interfere with and prevent plaintiff from the
proper exercise of his rights, and to execute a plan to harass, intimidate, and retaliate against plaintiff with respect to his employment, the litigation, and the exercise of his rights." Am. Compl. Par. 78.

[5]Two predicate acts of racketeering activity are necessary, but may not always be sufficient, to establish a pattern of racketeering activity. *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237-38 (1989).

[6]It is not contended that the relatedness prong has not been met in this case.

[7]Plaintiff's complaint contains two counts-Counts VII and VIII under § 1985(2), which provides, in relevant part:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely,

> fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, . . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws ... the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

In Count IX, Jackson presents a claim under § 1985(3), which provides, in relevant part:

> If two or more persons ... conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[9]Jackson alleges that "[a]t all times relevant and material hereto, the individual defendants were each acting in his/her official capacity. Alternatively, each acted in his/her individual capacity." Am. Comp/. Par. 15. However, Jackson does not allege that any of the individual defendants acted solely for his/her sole benefit or outside of the scope of his/her employment.

Cf. *Robinson*, 848 F.2d at 431.

[10]29 U.S.C. § 1104(a) provides, in relevant part:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and
>
> (A) for the exclusive purpose of:
>
> (1) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

[11]29 U.S.C. § 1105(a) provides:

> In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

[12]Section 1132 provides several other avenues for the civil enforcement of ERISA, but they are only available to certain entities-such as the employer or the Secretary of Labor-and not to plan participants.

[13]It is important to note that even *De Pace* held that compensatory damages are unavailable under § 1132(a)(3). *De Pace* stands as a notable exception because it allowed plaintiff to proceed under § 1132(a)(3) on a claim for front pay when "every district court ... addressing the issue post-Great- West[] has prohibited claims of front pay in ERISA cases." Kollman, 2005 WL 1941658, at * 10. Jackson does not argue that his claim for damages should be construed as one for equitable remedies such as restitution or front pay; thus, the court need not address the question of whether, under *Mertens* and *Great-West*, a court is ever entitled to award money damages as an equitable remedy under § 1132(a)(3).

[14]Because we are dismissing plaintiff's § 1104 and § 1105 claims for failure to state a claim, we have no occasion to consider whether Jackson's failure to exhaust his administrative remedies would be fatal to these claims.

No. 09-1872

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MARK JACKSON

v.

ROHM & HAAS COMPANY; MORGAN LEWIS & BOCKIUS LLP; CONRAD O'BRIEN GELLMAN & ROHN, P.C.; LIBERTY LIFE ASSURANCE COMPANY OF BOSTON; ROBERT VOGEL, Esquire; CELIA JOSEPH, Esquire; ROYCE WARRICK, Esquire; MICHAEL McLAUGHLIN, Esquire; JANE REENETZ; JAMES D. PAGLIARO, Esquire; PAUL J. GRECO, Esquire; P. DAFFODIL TYMINSKI, Esquire; ARETHA DELIGHT DAVIS, Esquire; NANCY J. GELLMAN, Esquire; KELLY G. HULLER, Esquire; LORI HAMLIN; DEANNA MAY; NANCY MAYO; ROHM & HAAS COMPANY BENEFITS ADMINISTRATIVE COMMITTEE; HARKINS CUNNINGHAM LLP; RAJ L. GUPTA; ROBERT A. LONERGAN, Esquire; ELLEN FRIEDELL, Esquire; WAYNE DAVIS; MARILYN ORR; WILLIAM O'BRIEN, Esquire; JOHN DOE NOS. 1-25, Mark Jackson; Richard J. Silverberg, Appellants (Pursuant to F.R.A.P. 12(a))

Filedd 3/18/2010

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. No. 05-cv-04988) District Judge: Honorable Louis H. Pollak

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and GREENAWAY, Circuit Judges, and CONNER, District Judge.*

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellants having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.